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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 640

J. EDWARD JONES, PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 17, 1935.

CERTIORARI GRANTED FEBRUARY 3, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Applicant-Appellee,

against

J. EDWARD JONES, Respondent-Appellant

STATEMENT UNDER RULE 13, PARAGRAPH 4, OF THE RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

This proceeding was commenced on July 3rd, 1935. On that day the Securities and Exchange Commission filed a written application upon which an order was made directing the respondent to appear and show cause why he should not be required to attend before the Commission and testify.

On July 6, the respondent was personally served with a certified copy of said order to show cause and written application.

The respondent entered his appearance and served and filed his answer on July 23rd, 1935.

On the same day the Court, Caffey, D. J., presiding, heard oral argument and directed both sides to submit briefs.

[fol. 2] On August 12, 1935, the Court rendered its opinion in writing and on August 23rd. 1935, the order appealed from granting the application and directing the respondent to attend and testify before the Commission was made and entered.

The appeal herein was taken on August 23rd, 1935.

The names of the original parties are set forth above and there has been no change of parties since the commencement of this proceeding. The applicant-appellee appears by John J. Burns, its general counsel in the City of Washington, District of Columbia, and the respondent-appellant appears by Harry O. Glasser of Enid, Oklahoma, J. N. Saye of Longview, Texas, and H. I. Fischbach of New York, N. Y.

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. M17-191

SECURITIES AND EXCHANGE COMMISSION, Applicant,

v.

J. EDWARD JONES, Respondent

APPLICATION FOR AN ORDER REQUIRING APPEARANCE BEFORE WILLIAM GREEN, AN OFFICER OF THE SECURITIES AND EXCHANGE COMMISSION, THERE TO GIVE EVIDENCE IN THE HEARING AND EXAMINATION ENTITLED, "IN THE MATTER OF THE REGISTRATION STATEMENT OF J. EDWARD JONES. FILE 2-1408-1"

The Securities and Exchange Commission, hereinafter sometimes referred to as the Commission, pursuant to the authority conferred upon it by Section 22 (b) of the Securities Act of 1933 (48 Stat. 74; 15 U. S. C. A. Sec. 77a—77aa) as amended June 6, 1934 by 48 Stat. 905, respectfully applies to this Honorable Court for an order requiring J. Edward Jones, an individual, having his principal place of business at 342 Madison Avenue, City, County and State of New York, and within the jurisdiction of the United States Court of the Southern District of New York, to obey the subpoena of the Commission issued June 18, 1935, re-
[fol. 4] quiring J. Edward Jones to appear and testify at an examination and hearing ordered to be held at the offices of the Commission, in Washington, D. C., on June 27, 1935. The said subpoena was issued for the purpose of securing evidence at an examination and hearing ordered by the Commission pursuant to Section 8 of the Securities Act of 1933, as amended, in order to determine whether a stop order should issue suspending the effectiveness of the registration statement filed with the Commission by the said respondent on or about May 4, 1935, because of the inclusion therein of untrue statements of material facts and the omission of material facts required to be stated therein, or necessary to make the statements therein not misleading. As grounds for this application the Commission respectfully shows to this Court:

I

The Securities and Exchange Commission is an administrative tribunal, organized and existing under and by virtue of Section 4 of the Securities Exchange Act of 1934 (48 Stat. 885).

II

The respondent, J. Edward Jones, resides in Scarsdale, County of Westchester, State of New York, and has his principal place of business at 342 Madison Avenue, City, County and State of New York. Both of said addresses are within the jurisdiction of the United States Court for the Southern District of New York.

III

On or about August 26, 1933, the Federal Trade Commission, pursuant to the authority therein conferred upon it [fol. 5] by Section 7 of the Securities Act of 1933, adopted by its order a form of registration statement known as "Form C-1". On or about September 4, 1934, pursuant to Section 210 of Title II of the Securities Exchange Act of 1934, all the powers, duties and functions of the Federal Trade Commission, under the Securities Act of 1933, were transferred to the Securities and Exchange Commission, and the said order of the Federal Trade Commission adopting and authorizing the use of Form C-1 has not been superseded, revoked or repealed by the said Securities and Exchange Commission, and pursuant to Section 210 of Title II of the Securities Exchange Act of 1934 is now in effect.

IV

On or about May 4, 1935, the respondent, J. Edward Jones filed with the Securities and Exchange Commission a registration statement on Form "C-1" pursuant to Section 6 of the Securities Act of 1933, as amended, which registration statement purported to contain the necessary statements and documents required to be set forth therein.

V

It appeared to the Commission that the said registration statement filed by the respondent included untrue statements of material facts and omitted statements of material

facts required to be stated therein or necessary to make the statement therein not misleading in the following particulars; to wit:

[fol. 6] 1. Item 13 of said registration statement, Form C-1, provides as follows:

Q. "Explain how and by whom the securities or other property composing the trust are purchased."

The response to said Item 13 made by the respondent upon the registration statement filed by him reads as follows:

A. "Property which will compose the trust is to be purchased by J. Edward Jones, 342 Madison Ave., New York. J. Edward Jones is also the Depositor and Sponsor."

The Commission alleges that the above response by this respondent is deficient in that it fails to state the manner in which the property composing the trust is to be purchased. The Commission has reason to believe that the services of agents are utilized in the purchase of said properties; that such agents are not petroleum engineers, geologists, or other experts; that said agents receive a fee for such services; and that J. Edward Jones relies upon the information of such agents.

2. Items 21 and 22 of said registration statement, Form C-1, together with responses respectively made thereto, are as follows:

Q. "If any periodic distributions have been made to certificate holders within the last 3 years prior to the date of this registration statement, show for each such distribution the dates, amounts, and sources thereof applicable in re-
[fol. 7] spect of each certificate."

A. "No distributions have been made and there are no certificate holders of this trust."

Q. "If any special distributions have been made to certificate holders within the last 3 years prior to the date of this statement, show for each such distribution the dates, amounts and sources thereof applicable in respect of each certificate."

A. "None have been made and there are no certificate holders."

The Commission alleges that the answers to these items contain untrue statements of material facts, and omit to state material facts required. The Commission has reason to believe that J. Edward Jones has sold other trust certificates and interim receipts; that he has made distribution from his personal funds to the holders of such interim receipts; and that distributions have been made to holders of such trust certificates from the funds of various trusts.

3. Items 23 and 24 of such registration statement, Form C-1, together with responses respectively made thereto, are as follows:

Q. "State the proposed dates, if any, upon which periodic distributions are to be made to the holders of certificates, by whom such distributions are to be made, in what manner, and from what funds."

A. "The dates of periodic distributions are not fixed; but it is the purpose and plan to make monthly periodic dis- [fol. 8] tributions where the net proceeds available for distribution warrant it. Distributions will be made from proceeds of the sale of oil from the royalties composing the corpus of the trust estate after deduction of expenses provided for in the Trust Agreement."

Q. "Explain the procedure in connection with the disposition and custody of the income of the trust from the time of its receipt until its distribution, and if any interest accrues thereon, explain the treatment thereof. If any person has the use of any undistributed income of the trust without interest for any period, state specifically the person and the circumstances."

A. "The income of the trust will be received monthly in the form of checks from the Oil Purchasing Companies purchasing the oil from the royalties comprising the corpus of the trust. This will be deposited to the account of the Trustee and distributed monthly, if conditions warrant their monthly distribution (See answer to 23). No interest will accrue and no person has the use of any undistributed income or moneys of the trust."

The Commission alleges that the answers to these items omit to state material facts required to be stated. The Commission has reason to believe that part of the income from the trust property will be paid to the respondent; that

the respondent intends to make distributions from such funds and from his personal funds to holders of interim receipts, which receipts he will distribute as part of his plan [fol. 9] of distribution of these trust certificates.

4. Item 36 of said registration statement, Form C-1, provides as follows:

Q. "State the method by which the price of the certificates to be sold is calculated, giving a full statement of all of the component parts thereof including the so-called 'service' or 'loading' charge."

The response to said Item 36 made by the respondent upon the registration statements reads as follows:

A. "The price of the certificates to be sold is calculated on the declared value of the property conveyed to the Trustee, the stated aggregate value of the certificates to be issued equalling the declared value of the property conveyed to the Trustee. No 'service' or 'loading' charge is provided for; but properties are selected by the Depositor, who is also the Sponsor, and paid for by him and conveyed to the Trustee at a value declared by the Depositor, who is also the Sponsor."

The Commission alleges that the above response by this respondent omits to state material facts. The Commission has reason to believe that, as part of a predetermined procedure, J. Edward Jones so declares the value on the royalties conveyed to the trust that he receives a "service" or "loading" charge well in excess of 100%; that such charge includes profit to respondent and charges incident to the creation and distribution of the trust certificates; and that [fol. 10] the imposition of such "service" or "loading" charge is part of the plan of creation and distribution of these securities.

5. Item 39 of said registration statement, Form C-1, provides as follows:

Q. "Name the person or classes of persons participating, directly or indirectly, in the 'service' or 'loading' charge, and state the percentage of such charge received by each."

The response to said Item 39, made by the respondent upon registration statement filed by him, reads as follows:

A. "No 'service' or 'loading' charge is provided for. J. Edward Jones, the depositor and Sponsor will participate in and will be entitled to any profit arising between the purchase price of the properties by him and the declared value at which the properties are conveyed to the Trustee."

The Commission alleges that the above response by this respondent contains untrue statements of material facts, and omits to state material facts required to be stated, and material facts necessary to be stated in order that the statements made therein may not be misleading. The Commission has reason to believe that, as part of a pre-determined plan, a "service" or "loading" charge is imposed upon the royalties deposited in this trust; that, from such "service" or "loading" charge commissions are paid to the agents who assist in the acquisition of the royalties, and to the dealers and agents who assist in the distribution of [fol. 11] the trust certificates; that a substantial profit accrues to respondent from such "loading" or "service" charge; and that the declaration of value above referred to is made to cover the above mentioned charges and profit to the respondent.

6. Item 40 of said registration statement, Form C-1, provides as follows:

Q. "If any component part of the offering price consists of brokerage, commissions, odd-lot premiums or other items of expenditure (other than the service or loading charge), state whether the items named are actually paid by the depositor or sponsor, and, if not, explain fully."

The response to said Item 40, made by the respondent upon the registration statement, reads as follows:

A. "No brokerage commissions or odd lot premiums or other items of expenditure are provided for."

The Commission alleges the above response by the respondent contains untrue statements of material facts and omits to state material facts required to be stated, and ma-

terial facts necessary in order that the statement made may not be misleading. The Commission has reason to believe that brokerage, or similar commissions, will be paid by the respondent in the acquisition of the properties to be deposited in this trust, and that such charges or commissions are considered in determining the amount of the "load" or charge to be imposed on the royalties deposited in the trust.

[fol. 12] 7. Item 45 of said registration statement provides as follows:

Q. "Describe briefly the general plan for the distribution of the certificates for which this registration statement is filed."

In response to said item 45, the respondent has stated, in the registration statement filed by him, as follows:

A. "As and when the properties are conveyed to the Trustee, as provided in the Trust Agreement, the Trustee delivers to the Trustor, J. Edward Jones, who is also the Depositor and Sponsor, certificates equal in value to the declared value of the properties conveyed, or delivers such certificates to a person designated by him. The certificates are sold by or through J. Edward Jones to the investing public at the stated value of $100 per each certificate, the cost of the sale and the commissions therefor being paid wholly by J. Edward Jones, Trustor."

The Commission alleges that the above response by this respondent contains untrue statements of material facts and omits to state material facts required to be stated, and material facts necessary in order that the statements made therein may not be misleading. The Commission has reason to believe that, as part of a predetermined plan of distribution of these certificates, J. Edward Jones will issue interim receipts for all funds received in the solicitation for the sales of these trust certificates; that such funds will then be utilized by respondent to purchase the oil royalties [fol. 13] to be deposited in this trust; that the solicitation of the sales of these trust certificates will be made through dealers or agents who will receive a substantial commission for such services; and that the cost of such services is included in the "service" or "loading" charge imposed upon the royalties deposited in this trust.

8. Item 48 of said registration statement, Form C-1, provides as follows:

Q. "Give details of every denial or restriction by any State regulatory body of the right to sell certificates issued under this trust."

The response to said Item 48 was made by the respondent and reads as follows:

A. "None."

The Commission alleges that the above response by this respondent contains untrue statements of material facts. The Commission has reason to believe that said respondent has been denied the right to sell any securities by the States of Pennsylvania and Connecticut, and that restrictions have been placed upon all sales of these securities in said States.

9. Item 51 of said registration statement provides as follows:

Q. "If more than 25 percent of the total assets of the trust, or of any unit thereof, consists of securities issued by one issuer and/or its subsidiary and/or affiliate, submit all of the data relative to such issuer, subsidiary, and/or affiliate, as would be required by Form A-1, as a separate ex-
[fol. 14] hibit, unless such data were originally filed with the Commission as of the time of the issuance of such securities."

The response to said Item 51, made by the respondent, is as follows:

A. "None of the assets is to consist of securities issued by the issuer or its subsidiary or affiliate."

The Commission alleges that the above response by this respondent contains untrue statements of material facts and omits to state material facts required to be stated. The Commission has reason to believe that the respondent will be the issuer of all securities to be deposited in this trust; and that information such as would be required by the Commission's Form A-1 has not been filed as a separate exhibit, as required by this item; and that such data had not been otherwise filed with the Commission.

10. Item 53 of said registration statement, Form C-1, provides as follows:

Q. "State the initial fees paid or to be paid to the trustee and the course of their payment."

The response to said Item 53 made by the respondent reads as follows:

A. "None."

The Commission alleges that the above response by this respondent contains untrue statements of material facts in that it appears that said respondent pays an initial fee to the trustee.

[fol. 15] 11. Item 61 of said registration statement, Form C-1, provided as follows:

Q. "Furnish information as to the ability of the trustee to perform the duties imposed upon him under the trust."

The response to Item 61 made by the respondent is as follows:

A. "American Charter Company is a corporation having perpetual existence and is organized under the laws of the State of Delaware and doing business therein."

The Commission alleges that above response by this respondent omits to state material facts required to be stated and material facts necessary to be stated in order that the statements made therein may not be misleading The Commission has reason to believe that the American Charter Company is financially irresponsible; that said American Charter Company is a personal service corporation organized by an attorney in the State of Delaware for the purpose of forming corporations, and has acted as trustee only for this respondent; that the total assets of the aforementioned American Charter Company would not be sufficient to meet any liabilities which might arise in connection with the performance of the duties imposed upon it under the trust.

12. Item 71 of said registration statement, Form C-1, provides as follows:

Q. "Under which of the trust issues mentioned in 70 is the depositor still creating trust certificates?"

The response made by respondent to Item 71 is as follows:

[fol. 16] A. "No additional trust certificates are now being created in any of the trusts mentioned in 70. It is contemplated that additional Certificates will be issued under Series "L" upon the conveyance of additional property to the Trustee thereunder."

The Commission alleges that the above response by this respondent contains untrue statements of material facts. The Commission has reason to believe that additional certificates are being sold under certain of the series previously created by the respondent.

13. Exhibit E of the registration statement provides as follows:

"Copies of any contracts or class of contracts used or to be used between the sponsor or depositor and underwriter or dealers relating to the sale or distribution of the certificates for which this registration statement is filed."

No copies of any such contracts have been filed. The Commission alleges that the above response by this respondent omits to state material facts required to be stated. The Commission has reason to believe that contracts exist between the respondent and certain dealers or agents relating to the distribution of the certificates for which the registration statement was filed.

14. Exhibit H of said registration statement provides as follows:

"Copies of orders of all State regulatory bodies by which any certificates of the trust were or are denied or restricted in the right to be sold, mentioned in item 48."

[fol. 17] No exhibits were filed in answer to said Exhibit H. The Commission alleges that the above response by the respondent omits to state material facts required to be stated. The Commission has reason to believe that certain orders have been issued by State regulatory bodies by which the certificates of this trust were denied or restricted in the right to be sold.

15. Exhibit Q of said registration statement provides as follows:

"Submit balance sheets of the depositor and/or sponsor as of the last day of the fiscal year prior to the filing of the registration statement for which year a balance sheet has been prepared, and if such day is more than ninety days prior thereto, a balance sheet of a date within ninety days prior thereto. Such balance sheets shall be in a form substantially as follows: * * *"

No such balance sheet has been filed. The Commission alleges that the above response by this respondent omits to state material facts required to be stated, in that the Commission has reason to believe that the respondent has prepared a balance sheet; that he has records available for the preparation of the balance sheet required in the aforementioned exhibit; and that the filing of such balance sheet would disclose material facts pertinent to the distribution of the certificates sought to be registered.

On May 20, 1935, pursuant to the provisions of Section 8 of the Securities Act of 1933, the Commission directed that an examination and a hearing to be held at the offices of the [fol. 18] Commission, at Washington, District of Columbia, on June 6, 1935, in order to determine whether a stop order should issue suspending the effectiveness of the said registration statement.

VII

On May 23, 1935, the Commission sent to respondent, J. Edward Jones the following telegram:

"Day Letter Prepaid

May 23, 1935.

J. Edward Jones, Care Floyd Toomey, Care Alvord and Alvord, Munsey Building, Washington, D. C.:

Notice is hereby given that upon examination of the registration statement of J. Edward Jones filed May four nineteen hundred thirty-five file two dash one four naught eight it appears to the Securities and Exchange Commission that such statement includes untrue statements of material facts and omits to state material facts required to be stated therein and material facts necessary to make the statements

therein not misleading in items thirteen and twenty-one comma twentytwo comma twentythree comma twentyfour comma thirtysix comma thirtynine comma forty comma fortyfive comma fortyeight comma fiftyone comma fiftythree comma sixtyone comma seventyone comma exhibits E [fol. 19] comma H comma Q comma and the prospectus stop hearing in this matter will be held at the office of the Commission in Washington D C at ten AM Thursday June six nineteen hundred thirtyfive at which time and place registrant may appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement

Francis P. Brassor, Secretary Securities and Exchange Commission."

The said telegram was confirmed by letter transmitted through the mails on May 24, 1935.

VIII

On June 5, 1935, the Commission made the following order designating William Green, an officer of the Commission to take testimony and fixing a time and place for taking testimony and evidence in the matter of the registration statement of J. Edward Jones:

"UNITED STATES OF AMERICA:

BEFORE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C. on the 5th day of June, A. D., 1935.

Commissioners: Joseph P. Kennedy, Chairman; George C. Mathews. James M. Landis. Robert E. Healy.

[fol. 20] In the matter of Registration Statement of J. EDWARD JONES. File No. 2-1408

Order Changing Designation of Officer for Taking Testimony

The Commission having heretofore, on May 25, 1935, designated John S. Hurley, an officer of the Commission, to take testimony at a hearing to be held in this matter on June

6, 1935, at 10 A. M., which hearing was on June 1, 1935, postponed to June 18, 1935.

It is ordered that such designation of the said John S. Hurley is hereby rescinded and

It is further ordered that William Green, an officer of the Commission, is hereby designated to administer oaths and affirmations, subpœna witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law.

Upon the completion of testimony in this matter, the of-
[fol. 21] ficer is directed to close the hearing and make his report to the Commission.

By direction of the Commission.

Francis P. Brassor, Secretary."

IX

On June 1, 1935, at the request of the respondent herein the said hearing and examination was adjourned to June 18, 1935, at the same hour and place of hearing.

X

On June 18, 1935, the hearing and examination was duly held at the offices of the Commission, at Washington, District of Columbia, and on that date the said hearing and examination was adjourned to June 27, 1935, at 10 o'clock A. M. at the same place.

XI

Pursuant to the power conferred upon him by Sections 8(e) and 19(b) of the Securities Act of 1933, the said William Green on June 18, 1935, issued a subpœna directed to the respondent requiring him to appear before the said William Green at the offices of the Securities and Exchange Commission, in Washington, District of Columbia, on June 27, 1935, there to testify in the matter of the registration statement of J. Edward Jones. On June 20, 1935, the said subpœna was duly served on the respondent J. Edward Jones, in the City of New York, State of New York and within the jurisdiction of this Court. A photostatic copy
[fol. 22] thereof is hereto attached and marked Exhibit A.

XII

On June 27, 1935, the hearing and examination in the matter of the registration statement of J. Edward Jones was duly held at the offices of the Securities and Exchange Commission at Washington, District of Columbia, and the respondent by his counsel refused to obey the said subpœna which had been served upon him requiring him to appear before the said William Green to testify in the matter of the registration statement of J. Edward Jones, at the offices of the Securities and Exchange Commission, at Washington, District of Columbia; and at the said hearing and examination held on June 27, 1935, counsel for the respondent stated that the respondent would not appear and that the respondent had been duly served with said subpœna within the City, County and State of New York.

Wherefore, your petitioner prays that pursuant to the provisions of Section 22(b) of the Securities Act of 1933, as amended, an Order be issued by this Honorable Court to the respondent J. Edward Jones requiring the said respondent to appear before the Commission, or one of its examiners designated by it, on a date to be designated by this Court, at the offices of the Securities and Exchange Commission at Washington, District of Columbia, there to testify in the matter of the registration statement of J. Edward Jones and to give answer to any and all pertinent questions regarding the information and documents [fol. 23] heretofore filed by the respondent with the Commission upon the said registration statement, Form "C-1."

John J. Burns, General Counsel.

Duly sworn to by John J. Burns. Jurat omitted in printing.

[fol. 24] SUBPŒNA, ANNEXED TO APPLICATION

UNITED STATES OF AMERICA:

Securities and Exchange Commission

To J. Edward Jones, 342 Madison Avenue, New York, N. Y.:

You are hereby required to appear before William Green, an Officer of the Securities and Exchange Commission, at

Room 1102, Securities and Exchange Commission, 1778 Pennsylvania Avenue, in the City of Washington, D. C., on the 27th day of June, 1935, at ten o'clock A. M. of that day, to testify in the Matter of the hearing on the Registration Statement of J. Edward Jones.

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Washington, D. C., this 18th day of June, 1935.

William Green, An officer of the Securities and Exchange Commission. (Seal.)

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the application of the Securities and Exchange Commission, filed herein on the 3rd day of July, 1935, duly verified by John J. Burns, General Counsel, on July 2, 1935, it is hereby

Ordered that the respondent show cause at a stated term of the United States District Court for the Southern District of New York, to be held in Room 235, Old Post Office Building, County of New York, State of New York, on the 9th day of July, 1935, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not issue requiring the said respondent J. Edward Jones, to appear before the Securities and Exchange Commission, or one of its examiners designated by it, on a date to be designated by this Court, at the offices of the Securities and Exchange Commission, at Washington, District of Columbia, there to testify in the matter of the registration statement of J. Edward Jones [fol. 26] and to give answer to any and all pertinent questions regarding the information and documents heretofore filed by the said respondent with the Commission upon the said registration statement, Form "C-1".

Further ordered, that service of a copy of this order to show cause, together with a copy of the application, be

made upon the respondent on or before the 6th day of July, 1935, and that such service be deemed sufficient service.

Henry W. Goddard, U. S. D. J.

July 3, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RESPONDENT J. EDWARD JONES

The respondent, J. Edward Jones, by his counsel, H. I. Fischbach of New York, New York, Harry O. Glasser of [fol. 27] Enid, Oklahoma, and J. N. Saye of Longview, Texas, appears herein specially and solely for the purpose of suggesting to the Court the matters hereinafter set forth and without admitting the jurisdiction of this Court denies generally each and every allegation contained in the petition of the above named applicant and makes answer thereto as follows:

First. Admits that the Securities and Exchange Commission, the applicant in this proceeding, is an administrative tribunal or purports such to be, and that it owes its existence, if any, to the provisions of Section 4, of the Securities Exchange Act of 1934, as alleged in paragraph designated "I", but respondent denies that the Securities and Exchange Commission is legally created or lawfully constituted.

Second. Admits each and every allegation contained in paragraph designated "II".

Third. Admits each and every allegation contained in paragraph designated "III", but denies the validity and legality of the acts and orders set forth therein on the grounds hereinafter more particularly set forth.

Fourth. Admits that on or about May 4, 1935, the respondent filed a Registration Statement on "Form C-1" and alleges that such Registration Statement contained all the necessary statements and documents required by law to be set forth therein and except as herein specifically ad-

mitted, denies each and every allegation contained in paragraph designated "IV".

Fifth. Denies each and every allegation contained in paragraph designated "V", and alleges without qualifica-
[fol. 28] tion that the answers given by respondent in said Registration Statement are true and complete on their face and further alleges that such answers include every material fact required to be stated in response to said questions.

Respondent further alleges that in addition there is stated every material fact necessary to make any statement contained in said Registration Statement not misleading and that neither by affirmative statement nor by the lack thereof is anything contained in said Registration Statement false, untrue or misleading.

Respondent further alle[illegible]at there is contained in Subdivisions 1 to 15 inclusi[illegible], various matter of an argumentative nature the materiality and relevancy of which does not appear and all of which is based on the Commission's allegation that it "has reason to believe" that various answers given in said Registration Statement omit to state material facts and respondent alleges that as to each of said matters no allegation in law or in fact is raised by said petition which should be controverted by respondent's pleading. That to assist the Court toward a better understanding of the matters in said Registration Statement deprecated by the Commission, respondent alleges:

As to the matters stated in Subdivision 1, respondent denies that the answer set forth in response to the quaere of "Form C-1" is deficient and alleges that said answer is complete and sufficient on its face.

Respondent further alleges that for many years he has had in his employ competent and experienced field agents whose activities have been broadly associated with the ex-
[fol. 29] amination of oil producing and oil bearing lands and the selection of oil royalties.

That such field agents keep respondent currently informed of such matters as concern respondent in the selection and purchase of oil royalty properties used by respondent for deposit in trusts created and marketed by him. Such field agents have always been reasonably compensated.

As to the matters stated in Subdivision 2, the answers of Respondent set forth in said Registration Statement are complete, true and accurate, and respondent denies that such answers are untrue or in any wise deficient.

The sale by respondent of certificates in other trusts has no relation whatever to the question in the Commission's form C-1 which presupposes the registrant to be offering an existing trust. Respondent reaffirms said answers in all their detail and alleges that there have been no distributions of certificates or of anything in the premises to anyone and that there are no parties in interest in the matter of said registration.

Respondent further alleges that there will be no parties in interest of said proposed trust by reason of the withdrawal thereof as hereinafter set forth.

As to the matters stated in Subdivision 3, although the answers appear on their face to be, and are in fact, complete and detailed, the Commission states that it "has reason to believe that part of the income from the trust property will be paid to the respondent" and other matters from a source equally nebulous and unfounded.

Respondent alleges that there is no fact or evidence to [fol. 30] justify such reason or such belief by the Commission.

As to the matters stated in Subdivision 4, reference is made by the Commission to an alleged predetermined procedure relating to a service or loading charge in excess of 100%. Respondent categorically denies such allegation and affirmatively alleges that the method by which the price of certificates in the trust proposed in said Registration Statement is calculated in the declared value of oil properties conveyed to the trustee as stated in its answer set forth in said Registration Statement.

As to the matters stated in Subdivisions 5 and 6, the answers set forth in said Registration Statement clearly indicates that "J. Edward Jones, the depositor and sponsor, will participate in and will be entitled to any profit arising between the purchase price of the properties by him and the declared value at which the properties are conveyed to the Trustee."

That the declared value at which oil properties would be conveyed to the trustee would take into consideration not

only the cost of acquisition in addition to purchase price, but proper allowance for overhead, cost of distribution and a fair and reasonable profit would seem to follow under all known standards of accepted business practices. That brokerage or odd-lot premiums do not enter into the business of marketing oil royalties. There exists no Exchange for the trading of oil royalty properties.

As to the matters stated in Subdivision 7, reference is here again made to a predetermined plan of operation which has been treated hereinbefore and pointed out to be [fol. 31] wholly unfounded in fact as are the other allegations of the Commission contained in this Subdivision.

As to the matters stated in Subdivision 8, respondent alleges that the answer as given in said Registration Statement is accurate, true and complete on its face and that the allegations of the Commission are unfounded in fact. The Series M. trust which was proposed to be created by said Registration Statement necessarily was not and could not have been restricted by any state or other regulatory body.

As to the matters stated in Subdivision 9, it is apparent that the Commission's Form A-1 could not have been filed as an exhibit as claimed by the Commission for the reason that the assets of the trust proposed to be created would have comprised royalty interests to be acquired by the respondent at a future date and conveyed to the trustee in futurum.

As to the matters stated in Subdivision 10, the payment, by respondent as an individual, of an honorarium to the trustee for accepting the duties and obligations of that office in no way is a material fact which need be stated inasmuch as the values of the properties or trust certificates purchased by investors is not in any way affected by the personal and individual payment by respondent of such honorarium, separate and apart from respondent's capacity as trustor.

As to the matters stated in Subdivision 11, the qualification of the American Charter Company, the named trustee, to perform the duties of that office, have never been questioned by any state Regulatory Authority and their ability and integrity has never been impugned by anybody whatever.

[fol. 32] Respondent alleges that the discharge of similar duties by said American Charter Company in other trusts

created by respondent has been, at all times, eminently satisfactory to all investors concerned and respondent further alleges that said American Charter Company has caused its personnel to be bonded in its trust operations and is lawfully organized and existing under and by virtue of the Corporate Laws of the State of Delaware.

As to the matters stated in Subdivision 12, the answer is deprecated on the ground that the Commission has reason to believe that the facts as stated in the answer are not true. The respondent reaffirms the said answer in each and every detail thereof and affirmatively alleges that the Commission's allegations are wholly unfounded.

As to the matters stated in Subdivision 13, the answer is deprecated on the ground that the Commission has reason to believe that the facts as stated in the answer are not true. The respondent reaffirms the said answer in each and every detail thereof and affirmatively alleges that the Commission's allegations are wholly unfounded.

As to the matters stated in Subdivision 14, respondent prays that the Commission be directed to produce the orders which it "has reason to believe have been issued" by State Regulatory bodies denying or restricting the right of the respondent to sell the certificates of the trust sought to be created. That no such orders are in existence.

As to the matters stated in Subdivision 15, respondent alleges that the balance sheet contemplated by said requirement of "Form C-1" is the balance sheet of an investment [fol. 33] trust having an existence at least 90 days prior to the application for registration. That a balance sheet of the trust then proposed by respondent was impossible of construction, there being no assets, no liabilities, no trust in existence, no properties and no sales to customers.

Sixth. Admits each and every allegation contained in paragraph designated "VI", but denies the legality and the propriety of the acts therein alleged on the grounds hereinafter more particularly set forth.

Seventh. Admits the sending and receipt of a telegram as alleged in paragraph designated "VII", but denies the allegation contained in such telegram.

Eighth. Admits each and every allegation contained in paragraph designated "VIII", but denies the legality and

the propriety of the acts therein alleged on the grounds hereinafter more particularly set forth and further alleges,

(a) That William Green, designated in said order as "an officer of the Commission" is, and at the time of such designation was, a member of the legal staff of the Securities and Exchange Commission.

(b) That the designation purported to be made by said order was improper and illegal in that the duties of said office did and does require the exercise of independent judgment, the making of rulings upon matters affecting the admissibility of evidence, the acceptance and rejection of testimony, the determination of the credibility of witnesses and all other incidental duties and powers of a quasi-judi- [fol. 34] cial officer including the making of a report or a decision to the Commission and that said William Green, designated as aforesaid, was and is incapacitated by law from accepting said appointment by reason of his status as an attorney for said Commission.

Ninth. Admits each and every allegation contained in paragraph designated "IX".

Tenth. Admits that on the 18th day of June, 1935 a hearing, presided over by William Green, was commenced by the Securities and Exchange Commission in its offices in the City of Washington, District of Columbia, but denies the legality and propriety of each and every further act or purported act alleged in paragraph designated "X", and denies the power or jurisdiction of said Commission or said William Green to direct the adjournment therein alleged on the grounds more particularly hereinafter set forth.

Eleventh. Denies each and every allegation contained in paragraph designated "XI", except that on the 20th day of June, 1935, within the jurisdiction of this Court the respondent was personally served with a paper purporting to be a subpœna issued by said William Green, but denies the legality and validity of said subpœna and denies that said William Green had any power or jurisdiction to issue said purported subpœna or cause said purported subpœna to be served upon this respondent, and denies the legality, propriety and validity of all of the aforesaid acts.

Twelfth. Admits each and every allegation contained in paragraph designated "XII" except the allegations [fol. 35] thereof that the proceedings of the Securities and Exchange Commission on said 27th day of June, 1935 were "duly" held and that respondent had been "duly" served, which he denies.

For a First Affirmative Defense Respondent Alleges:

Thirteenth. That the Securities and Exchange Commission, the applicant in this proceeding has no legal existence and is not a tribunal or body lawfully created and that its process is void and without legal efficacy in that the so-called Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934 known as "Securities Exchange Act of 1934", by which said commission purports to exist is unconstitutional and is violative of and repugnant to the provisions of the "Fourth", "Fifth", "Ninth", "Tenth", and "Fourteenth" Amendments to the Constitution of the United States.

Fourteenth. That the Securities Exchange Act is void as an attempted delegation of legislative power to the Securities and Exchange Commission and as such is plainly in violation of the "Fourth", "Fifth", and "Ninth" Amendments to the Constitution of the United States.

Fifteenth. That the Securities Exchange Act is, and the Amendments thereto are, void because the same are an attempt by the National Government to usurp powers reserved to the respective states and the people thereof by the "Tenth" Amendment to the Constitution of the United States.

[fol. 36] Sixteenth. That the Securities and Exchange Commission in the interpretation of its powers has sought to legislate in the matter of rules promulgated by the Commission to have the effect of Acts of Congress, which could not lawfully be so without first having been introduced as a bill in one of the Houses of Congress, then having passed both Houses, be finally approved by the President of the United States or re-enacted over his veto.

Seventeenth. That a National emergency brought about by financial depression did not bestow upon Congress the

power to enact the Securities Exchange Act or amendments thereto.

Eighteenth. That this respondent and all others similarly situated and engaged, in the State of New York or elsewhere, in the sale of units of ownership in oil and/or gas royalties and/or "working interest production" in the State of Oklahoma or elsewhere, is not engaged in an activity which affects interstate commerce except incidentally and remotely and such business therefore is not subject to regulation by the Federal Government.

Nineteenth. That the business of this respondent and others similarly situated in the sale, in the State of New York or elsewhere, of units of ownership in oil production in the State of Oklahoma which may or may not find its way out of the State of Oklahoma, is an intra state business wholly within the regulatory control of the State of New York and the Federal Government is therefore without authority under the commerce clause of the Constitution of [fol. 37] the United States to control the transportation of such harmless commodities as may incidentally or remotely find their way into inter-state commerce or foreign commerce.

Twentieth. That the business of the respondent and others similarly situated in the sale, in New York, of units of ownership in oil and/or gas royalties and/or "Working interest production" in the State of Oklahoma or elsewhere, is not a business involving a public offering of securities in inter-state commerce within the regulatory control of the Federal Government.

For a Second Affirmative Defense Respondent Alleges:

Twenty-first. That on the 4th day of May, 1935, respondent caused to be filed a Registration Statement on "Form C-1" which Registration Statement was subsequently given file number 2-1408-1.

Twenty-second. That thereafter and on or about the 18th day of June, 1935 before any final action had been taken thereon, respondent did dismiss and withdraw such Registration Statement (of which fact the applicant neglected to inform the Court) in the following manner, to wit:

(a) That on said 18th day of June, 1935, the Securities and Exchange Commission being in regular session and a hearing thereof being presided over by one William Green, its proceedings being identified with the Registration Statement bearing file number 2-1408-1, respondent entered his [fol. 38] appearance by his counsel, H. I. Fischbach. Counsel for the Commission and for your respondent being in attendance thereat, respondent by and through his said counsel notified and advised said Commission of the withdrawal by respondent of said Registration Statement.

(b) That said William Green thereupon refused to permit the withdrawal of said Registration Statement alleging that he had discretion either to permit or to refuse the withdrawal thereof and without assigning any reason whatever for the exercise of said alleged power of discretion in the premises, announced that the ruling of the Commission was that the withdrawal of said Registration Statement would not be permitted, to which ruling respondent by his said counsel duly excepted.

(c) That after taking such exception counsel for respondent withdrew from the further proceedings of said Commission.

Twenty-third. That the withdrawal of said Registration Statement as aforesaid was an accomplished fact and the attempt of the Commission to retain jurisdiction thereof was void, unlawful and improper, and the ruling of said Commission in respect thereto as aforesaid was void and arbitrary and without any foundation therefor in law or fact, as were any and all proceedings of said Commission subsequent in point of time to the withdrawal of said Registration Statement and respondent further alleges that the action of said Commission in attempting to retain jurisdiction of said Registration Statement was beyond the powers conferred upon it, if any, by the Securities Act of 1933 as amended by Title II of the Securities Act of 1934.

[fol. 39] Twenty-fourth. That the purported subpoena, upon which this application is based and pursuant to which the applicant herein seeks to compel the attendance of respondent before it, was issued by said Commission at an hour subsequent in point of time to the aforesaid withdrawal of said Registration Statement and at a time when

there was no proceeding pending before such Commission out of or in aid of which it could validly issue process and Respondent further alleges that there was no proceeding pending before said Commission at the time of the service of said purported subpœna.

For a Third Affirmative Defense Respondent Alleges:

Twenty-fifth. That on the 27th day of June, 1935, the Securities and Exchange Commission assumed to retain jurisdiction of said Registration Statement, despite its withdrawal, and assumed to act further in the premises at a purported adjournment of the proceedings identified with said Registration Statement to the lawful pendency of which respondent, by his said counsel had duly excepted. Respondent thereupon appeared specially by his counsel, Harry O. Glasser, J. N. Saye and H. I. Fischbach who presented to said Commission, William Green presiding, a document entitled "Dismissal" duly verified by respondent, a copy of which is annexed hereto and made a part hereof, marked Exhibit "A" and to which reference is hereby made with the same force and effect as if the same were set forth in its entirety in haec verba.

Twenty-sixth. That such "Dismissal" was overruled and [fol. 40] denied by said Commission to which ruling and order respondent's counsel duly excepted.

Twenty-seventh. That at the same time and place respondent's counsel presented and filed a document entitled "Motion to Dismiss" duly verified by respondent, a copy of which is annexed hereto and made a part hereof, marked Exhibit "B" and to which reference is hereby made with the same force and effect as if the same were set forth in its entirety in haec verba.

Twenty-eighth. That such "Motion to Dismiss" was overruled and denied by said Commision to which ruling and order respondent's counsel duly excepted.

Twenty-ninth. That at the same time and place respondent's counsel presented and filed a document entitled "Motion to Quash" duly verified by respondent, a copy of which is annexed hereto and made a part hereof, marked Exhibit "C" and to which reference is hereby made with the same force and effect as if the same were set forth in its entirety

in haec verba, which "Motion to Quash" was overruled and denied and to which ruling and order respondent's counsel duly excepted.

Thirtieth. Respondent further shows this Court that by Section 9 of the Securities Exchange Act of 1934 a remedy for the review of an order of the Commission is provided to the exclusion of all others in the following language:

"Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein [fol. 41] such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commision, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original [fol. 42] order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347.)"

Thirty-second. That being aggrieved by each of the said rulings and orders made by said Commission in the manner hereinbefore stated and pursuant to the authority of said Section 9, respondent immediately upon the conclusion of said purported proceedings, of the 27th day of June, 1935, did prepare and file a Petition for Review in conformity with said Section 9 of said Act in the Circuit Court of Appeals of the United States in and for the Second Circuit, a copy of said Petition for Review is attached hereto and made a part hereof and reference thereto is hereby made with the same force and effect as if the same were set forth in its entirety in haec verba.

Thirty-third. That by reason thereof as it affirmatively appears in said Petition for Review the matter of the application before this Court is plainly included in such Petition for Review and is now pending in the said Circuit Court of Appeals.

Thirty-fourth. That this Honorable Court is without jurisdiction to entertain this application by reason of the jurisdiction of this controversy vested in said Circuit Court of Appeals and this Court has no jurisdiction in the premises other than to certify the application made in this pro-
[fol. 43] ceeding to said Circuit Court of Appeals for final action upon its said Petition for Review now pending; that manifestly an order adverse to the respondent herein would, upon appeal, present a second Petition for Review upon the identical question now pending in said Circuit Court of Appeals.

Wherefore, respondent respectfully prays that this Court certify and refer this proceeding in its entirety to the Circuit Court of Appeals of the United States in and for the Second Circuit for such action thereon as to said Court may seem meet and proper, or in the alternative that the petition herein be dismissed and that respondent have such other and further relief as will do justice to the cause.

J. Edward Jones, Respondent, by H. I. Fischbach, Harry O. Glasser, J. N. Saye, Counsel.

Duly sworn to by J. Edward Jones. Jurat omitted in printing.

[fol. 44] STATEMENT AS TO EXHIBITS ANNEXED TO ANSWER

Exhibits A, B, C and D annexed to the answer of J. Edward Jones, are not reproduced here pursuant to stipulation, they being identical with Exhibits F, G, H and I attached to the Petition for Review, and reproduced therein at pages 143 to 151, infra.

[fol. 45] EXHIBIT TO ANSWER—PETITION FOR REVIEW NOW PENDING IN CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA:

CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

J. EDWARD JONES, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent

Petition for Review

The petition of J. Edward Jones by Harry O. Glasser of Enid, Oklahoma, J. N. Saye of Longview, Texas and H. I. Fischbach of New York, N. Y., his counsel, respectfully shows this Court and alleges.

1. That your petitioner is a citizen of the United States, a resident of the County of Westchester in the State of New York, and maintains and has his principal place of business at 342 Madison Avenue in the Borough of Manhattan, City, County and State of New York all within the Second Circuit of the Circuit Court of Appeals of the United States.

2. That by section 9 of Title I, the Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934, jurisdiction is vested in this Honorable Court to re-[fol. 46] view any order of the Securities and Exchange Commission, upon the petition of any person feeling aggrieved thereby.

3. Heretofore and on or about the 4th day of May, 1935, your petitioner voluntarily and duly filed with the Securities and Exchange Commission a document entitled "Regis-

tration Statement Form C-1 Investment Trusts" a copy of which is annexed hereto, made a part hereof, marked Exhibit A, with the same force and effect as if same were set forth in its entirety in haec verba.

4. That thereafter and on or about the 23rd day of May, 1935, Francis P. Brassor, Secretary of said Commission and on behalf thereof did forward to petitioner a Western Union Telegram, the original of which was received by petitioner and a copy of which is annexed hereto, made a part hereof marked Exhibit B, with the same force and effect as if the same were set forth in its entirety in haec verba.

5. That thereafter and on or about the 6th day of June, 1935, the hearing docketed for said day by said Commission was by agreement duly adjourned to the 18th day of June, 1935 at the hour of 10:00 A. M.

6. That thereafter and on or about the 15th day of June, 1935, petitioner upon returning to his place of business aforesaid found that there had been left there at about the hour of 3:00 P. M. a subpœna duces tecum which by its terms commanded the appearance of your petitioner before said Securities and Exchange Commission at Washington, D. C. on the 18th day of June, 1935, in addition to the production thereat of certain books, papers and documents. A [fol. 47] copy of said subpœna duces tecum is annexed hereto, made a part hereof, marked Exhibit C, and reference thereto is hereby made with the same force and effect as if here set forth in its entirety in haec verba.

7. That on said 18th day of June, 1935, your petitioner entered his appearance by his counsel, H. I. Fischbach, at a hearing before said Commission in Washington, D. C. and thereupon said Commission being in regular session and said hearing being presided over by an officer thereof, the Honorable William Green, and counsel for the Commission and your petitioner being in attendance thereat, petitioner by and through his counsel, H. I. Fischbach, did notify and advise said Commission that petitioner withdraws the Registration Statement identified with said proceeding and given file number 2-1408, said Registration Statement so withdrawn being the identical document a copy of which is annexed hereto as Exhibit 'A'.

8. That thereupon the said Hon. William Green, Acting Examiner, refused to permit the withdrawal of said Regis-

tration Statement citing in support of said refusal and ruling Release #47 promulgated by said Commission, a copy of which Release #47 dated September 22, 1933 is annexed hereto for the convenience of the Court as Exhibit D, to all of which refusal and ruling petitioner by his said counsel duly took exception.

9. That thereupon counsel for petitioner withdrew from the further proceedings of the day.

10. That thereafter and on or about the 19th day of June, 1935 in New York, your petitioner was personally served with a purported subpœna which by its terms com-
[fol. 48] manded the appearance of your petitioner before said Securities and Exchange Commission at Washington, D. C. on the 27th day of June, 1935 at 10:00 o'clock A. M. A copy of said subpœna is annexed hereto, made a part hereof marked Exhibit 'E' and reference thereto is hereby made with the same force and effect as if said purported subpœna were here set forth in its entirety in haec verba.

11. That thereafter and on the 27th day of June, 1935 at the hour of 10:00 o'clock A. M. in the hearing chamber of the Respondent at Washington, D. C., the Hon. William Green, Acting Examiner, presiding, your petitioner appeared specially by his counsel, Harry O. Glasser, J. N. Saye and H. I. Fischbach and thereupon the presiding Examiner announced that the Commission was ready to proceed with the matter, and thereupon counsel for petitioner stated that they desired to present certain motions in behalf of the petitioner tendering copies thereof to counsel for the Commission who thereupon requested a recess of 30 minutes for the examination of the same which was granted. After said recess, the Commission reconvened, the Honorable William Green presiding and thereupon counsel for petitioner presented and filed a document entitled "Dismissal", duly verified by petitioner, a copy of which and the verification thereof being annexed hereto, made a part hereof, marked Exhibit F and reference thereto is hereby made with the same force and effect as if the same was here set forth in its entirety in haec verba, which "Dismissal" was overruled and denied by said Commission, to all of which ruling and order petitioner duly excepted, and by which ruling
[fol. 49] and order petitioner is aggrieved and prays a

review thereof by this Honorable Court in the manner provided by law.

12. That thereupon counsel for petitioner presented and filed a document entitled "Motion to Dismiss," duly verified by petitioner, a copy of which and the verification thereof being annexed hereto, made a part hereof, marked Exhibit G and reference thereto is hereby made with the same force and effect as if the same was here set forth in its entirety in haec verba, which "Motion to Dismiss", was overruled and denied by said Commission, to all of which ruling and order petitioner duly excepted, and by which ruling and order petitioner is aggrieved and prays a review thereof by this Honorable Court in the manner provided by law.

13. That thereupon counsel for petitioner presented and filed a document entitled "Motion to Quash", duly verified by petitioner, a copy of which and the verification thereof being annexed hereto, made a part hereof, marked Exhibit H and reference thereto is hereby made with the same force and effect as if the same was here set forth in its entirety in haec verba, which "Motion to Quash" was overruled and denied by said Commission, to all of which ruling and order petitioner duly excepted, and by which ruling and order petitioner is aggrieved and prays a review thereof by this Honorable Court in the manner provided by law.

14. That thereupon counsel for petitioner presented and filed a document entitled "Objection to Jurisdiction," duly verified by petitioner, a copy of which and the verification [fol. 50] thereof being annexed hereto, made a part hereof, marked Exhibit I and reference thereto is hereby made with the same force and effect as if the same was here set forth in its entirety in haec verba, which "Objection to Jurisdiction" was overruled and denied by said Commission, to all of which ruling and order petitioner duly excepted, and by which ruling and order petitioner is aggrieved and prays a review thereof by this Honorable Court in the manner provided by law.

15. That petitioner is aggrieved by said rulings and orders, and each and every part thereof and alleges that they are separately and severally contrary to law and deprive petitioner of his substantial rights.

Wherefore petitioner prays a review thereof in conformity with Section 9 of the Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934 and thereupon that such orders and ruling complained of and by which petitioner is aggrieved be modified or set aside in whole or in part and for such other, further and different relief as to the Court may seem proper and just in conformity with law.

J. Edward Jones, Petitioner, by Harry O. Glasser, J. N. Saye, H. I. Fischbach.

[fol. 51] *Duly sworn to by Hyman I. Fischbach. Jurat omitted in printing.*

[fol. 52] EXHIBIT A ANNEXED TO PETITION FOR REVIEW

Registration No. —

Form C-1

Securities and Exchange Commission, Washington, D. C.

Registration Statement

Investment Trusts

Name of Depositor: J. Edward Jones.
Address: 342 Madison Ave., New York, N. Y.
Name of Sponsor: J. Edward Jones.
Address: 342 Madison Ave., New York, N. Y.
Name of Trustee: American Charter Company.
Address: 800 Citizens Bank Bldg., Wilmington, Del.
Name of Trust: J. Edward Jones Royalty Trust, Series "M".
Type of Issue: Participation Trust Certificates in producing oil royalties.
Number of Certificates for which this Registration Statement is Filed: 1,000.
Aggregate Offering Price: $100,000.
Amount of Fee: $25.
Date of Proposed Public Offering: May 24, 1935.
Name and Address of Person who is Authorized to Receive Service and Notice of all Notices and Orders Which

May be Issued by the Securities and Exchange Commission Relating to this Registration Statement: Floyd Toomey, C/o Alvord & Alvord, Munsey Building, Washington, D. C. [fol. 53] Unincorporated Investment Trusts Not Having a Board of Directors (or Persons Performing Similar Functions) of the Fixed or Restricted Management Type Having a Depositor or Sponsor.[1]

The following questions apply as indicated to the trust, to the trustee, to the depositor or sponsor, and should be answered fully. If the answer to any question is not available or known, so state and explain.

Information Concerning the Trust

1. Full name of the trust.
J. Edward Jones Royalty Trust, Series "M".

2. Full name of the certificates [2] for which this registration statement is filed..
Participation Trust Certificates.

3. Name and address of counsel who has rendered an opinion regarding the legality of the certificates for which this registration statement is filed.
E. J. Lundy, 1308 Hunt Bldg., Tulsa, Okla.

4. The date of the execution of the trust agreement.
May 2, 1935.

5. The number, if any, of certificates of the trust now outstanding.
None.

[fol. 54] 6. State the aggregate offering price at which the certificates are offered for which this registration statement is filed. This offering price shall be the equivalent of the selling price of these certificates to the public as of a

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[1] Investment trusts not included in above specification should file on Form A-1.

[2] The term "certificate" as used herein shall not mean merely such documents as evidence an interest in the trust but shall mean the fractional interests in the trust which are offered and sold.

specified day within 15 days prior to the filing of the registration statement,[3] computing such selling price upon the same basis as that at which the certificates are to be offered to the public. The aggregate offering price is the product of the offering price per certificate as above defined and the number of certificates for which this registration statement is filed. (The fee payable for registration, if in excess of $25, in one one-hundredth of 1 percent of the aggregate offering price.)

$100,000.

7. The proposed date of initial public offering of the certificates for which this registration statement is filed.

May 24, 1935.

8. Are the certificates in bearer or registered form?

Registered form.

9. If such certificates are or may be registered, state the name of the registrar.

American Charter Co., 800 Citizens Bank Bldg., Wilmington, Del.

10. Are the certificates of the cumulative or distributive type?

Distributive type.

11. If the trust is of the unit type, furnish a list of the securities composing a unit as of a date within 15 days [fol. 55] prior to the filing of this registration statement, and state the number of certificates issued against each unit.

The entire properties, consisting of oil royalties which are to be conveyed by the Depositor, who is also the Sponsor, constitute one unit, the entire corpus or trust estate being the unit. Certificates of the stated value of $100 each are to be issued; the aggregate amount of certificates to be issued are equal in aggregate amount to the declared value of the properties conveyed by the Depositor to the Trustee.

12. If the trust is not of the unit type, state the composition of the trust property as of a date within 15 days prior to the filing of the registration statement.

No properties have been conveyed to the Trustee.

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[3] Whatever date is chosen in this connection should be maintained for items 11, 12, 38, 41, 69 and 75.

13. Explain how and by whom the securities or other property composing the trust are purchased.

Property which will compose the trust is to be purchased by J. Edward Jones, 342 Madison Ave., New York. J. Edward Jones is also the Depositor and Sponsor.

14. What limitations, if any, are expressly placed upon those making purchases for the trust as to purchases from the depositor or sponsor, or from the officers or directors of the depositor or sponsor, or from persons in whom such depositor or sponsor, its officers or directors, are officers, directors, or stockholders. If no such express limitations exist, make a specific statement to that effect.

None.

[fol. 56] 15. State the conditions, if any, upon which securities or other property held in the trust may be eliminated therefrom, and the disposition made of the proceeds thereof.

Property acquired by the Trustee by conveyance thereof to him from J. Edward Jones, the Depositor, cannot be eliminated from the trust, except that under the provisions of the Trust Agreement the Trustee, with the consent in writing of holders of two-thirds in amount of the aggregate of the certificates issued and outstanding at the time of consent, may sell or dispose of all or a portion of the properties of the trust. The trust may be wound up and liquidated prior to the 21 year limitation period fixed for its existence upon the consent in writing of two-thirds of the aggregate amount of certificates then issued and outstanding. The Trustee has no authority to purchase other properties with the proceeds of any property sold; but the proceeds will be distributed to certificate holders pro rata.

16. State the conditions, if any, upon which securities or other property may be substituted for or added to the securities comprising the trust.

Securities or other property cannot be substituted for property conveyed to the Trustee, which property comprises the trust.

17. What disposition is made of stock dividends, rights, split ups, and the like, derived from the deposited property?

There are no dividends, rights or split-ups.

18. If sold, what express limitations does the trust indenture place upon the length of time that stock dividends, rights, split ups, and the like may be held before sale, and [fol. 57] what disposition is made of the proceeds thereof? If no such governing provisions are contained in the trust indenture, what is or will be the practice with reference thereto?

There are no dividends, rights or split-ups and no provision is therefore made with respect to them.

19. State concisely the provisions, if any, for giving certificate holders the right to exercise a vote in respect of the securities held in the trust.

The certificate holders have no right to exercise a vote in respect of the securities held in the trust, except that the holders of two-thirds in the aggregate amount of certificates issued and outstanding may consent to a sale of a portion or all of the property by the Trustee (See answer to 15).

20. If certificate holders do not have or do not exercise such voting rights, state by whom such rights are exercised.

The right to select properties to be conveyed to the Trustee is vested in J. Edward Jones, Depositor and Sponsor, and the Trustee is obliged to accept the value so declared by J. Edward Jones.

21. If any periodic distributions have been made to certificate holders within the last 3 years prior to the date of this registration statement, show for each such distribution the dates, amounts, and sources thereof applicable in respect of each certificate.

No distributions have been made and there are no certificate holders of this trust.

22. If any special distributions have been made to cer- [fol. 58] tificate holders within the last 3 years prior to the date of this statement, show for each such distribution the dates, amounts, and sources thereof applicable in respect of each certificate.

None have been made and there are no certificate holders.

23. State the proposed dates, if any, upon which periodic distributions are to be made to the holders of certificates,

by whom such distributions are to be made, in what manner, and from what funds.

The dates of periodic distributions are not fixed; but it is the purpose and plan to make monthly periodic distributions where the net proceeds available for distribution warrant it. Distributions will be made from proceeds of the sale of oil from the royalties composing the corpus of the trust estate after deduction of expenses provided for in the Trust Agreement.

24. Explain the procedure in connection with the disposition and custody of the income of the trust from the time of its receipt until its distribution, and if any interest accrues thereon, explain the treatment thereof. If any person has the use of any undistributed income of the trust without interest for any period, state specifically the person and the circumstances.

The income of the trust will be received monthly in the form of checks from the Oil Purchasing Companies purchasing the oil from the royalties comprising the corpus of the trust. This will be deposited to the account of the Trustee and distributed monthly, if conditions warrant their monthly distribution (See answer to 23). No inter-
[fol. 59] est will accrue and no person has the use of any undistributed income or moneys of the trust.

Supplemental Answer 25

25. Explain every sum that is, or may be, directly or indirectly, deducted or set aside for any purpose (other than as a reserve) from the trust property, including the income therefrom, the purpose of such deduction, the person to whom paid, or, if held, by whom held, and the provisions for its ultimate disposition.

Paragraph 33 of the Trust Agreement provides as follows:

"33. The Trustee shall have and it is hereby granted a first lien upon all of the trust property herein, for all its fees, charges, etc., which shall be as follows:

From the Trustor:

1. Attorney and counsel fees in connection with this agreement or in connection with any matter arising thereunder including counsel fees for the preparation of this

trust agreement for the preparation and filing of any registration statement or prospectus with state or federal authorities; provided that the expenses for counsel fees in the preparation of this trust agreement and in completing the preparation of the registration statement, the prospectus or other documents to be filed with said state or federal authorities and all other services up to the time [fol. 60] that any said registration statement shall become effective shall not exceed the sum of $5,000.00.

2. All disbursements for the recordation of all documents to be registered in accordance with the terms of this agreement.

3. $1.00 per each certificate issued by the Trustee.

From the trust property or its income:

4. For the maintenance of each account upon books of the Trustee—25¢ per annum.

5. For the payment or distribution of the income or receipts of this trust to the certificate holders—5% of the gross receipts or income. Said 5%, however, shall not be less than the sum of 15¢ per check issued by the Trustee.

6. For all out of pocket expenses of the Trustee, including postage, books of account, checks, stationery and other necessary supplies used in connection with the administration of the Trust."

In paragraph 21 of the Trust Agreement it is provided as follows:

"All municipal, state and federal taxes, fees and charges, Trustee's expenses and supervision expenses shall be a lien upon the property composing the trust fund herein and/or its income and shall be paid out of the income, if [fol. 61] any, and if there be no income then out of the principal of the trust fund herein.

"Anything herein to the contrary notwithstanding, the Trustee shall have full discretionary powers as to the manner of how, when and from what property or income herein the said taxes, fees and charges may be paid."

25. Explain every sum that is or may be, directly or indirectly, deducted or set aside for any purpose (other

than as a reserve) from the trust property, including the income therefrom, the purpose of such deduction, the person to whom paid, or, if held, by whom held, and the provisions for its ultimate disposition.

See Supplemental Answer to 25.

26. Explain every sum that is or may be, directly or indirectly, deducted or set aside as a reserve from the trust property, including the income therefrom, the object of such reserve, the person by whom held, and the provisions for its ultimate disposition.

Paragraph 47 of the Trust Agreement provides:

"Out of the income of the trust fund herein created the Trustee shall set apart ½ of 1% as a reserve fund, which reserve fund is to be used first for the payment of any fee, charge and cost, including attorney's fees, that may be incurred herein, when same cannot be paid from the current income. Upon the said reserve fund reaching the sum of $2,000 no more shall be added, except to replace disbursements therefrom."

[fol. 62] No provision other than this is made for a reserve fund.

27. State whether the depositor, sponsor, trustee, or any other person has or may create a lien on the trust property, and if so, give full particulars thereof.

No person may create a lien on the trust property; but the Trustee, by the Trust Agreement, is given a lien on the trust property for certain expenses, expenditures. (See detailed answer in Supplemental Answer 25.)

28. State the terms and conditions upon which a holder of the trust certificates may terminate his interest; the charges for termination and to whom such charges are paid; and by whom and the method by which the value of the certificates is determined.

No provision is made for the termination of the interest of the holder of trust certificates. He may sell and assign his certificates to another. No method is provided for determining the value of the certificates.

29. State how, the date when, and under what circumstances the trust is to be, or may be, terminated as an entirety.

The trust must be terminated immediately after 21 years from the date of the Trust Agreement, which is May 2,

1935, unless sooner terminated. It may be sooner terminated by the Trustee upon consent in writing of the holders of ⅔ in aggregate amount of certificates issued and outstanding. The sale of all the property under such consent would amount to a termination of the trust as an entirety as no provision is made for reinvestment of the [fol. 63] proceeds of the sale of any or all of the property (See answers to 15 and 19; see Supplemental Answer 29).

30. If the trust may be extended as an entirety beyond the termination date, state how and under what circumstances.

The trust may not be extended as an entirety beyond its termination date.

31. Describe the method by which, and name the person by whom, the trust will be liquidated upon its termination as an entirety.

The Trustee in office at its termination will liquidate the trust either by conveyance to each certificate holder of his or her fractional prorata interest in the properties, or by a sale of the properties either at public or private sale and distribution of the proceeds of the sale to the certificate holders (See answer and Supplemental Answer to 29).

32. State all charges or deductions which may be made for, or in connection with, such liquidation and to whom paid and the purpose therefor.

Upon liquidation all expenses and claims against the trust will be paid and the Trustee will be entitled to receive reasonable liquidation charges. No specific amount for charges or deductions in connection with the liquidation is provided for. The language of the Trust Agreement with respect thereto is as follows:

"25. The Trustee shall apply the proceeds of any sale of the trust property herein as follows:

1. The payment of all taxes, charges, fees, costs and dis- [fol. 64] bursements and expenses incurred by the Trustee, including all attorneys' fees.

2. The division of the balance, if any, among the record holders of said Participation Trust Certificates, prorata as their interest may appear."

Supplemental Answer 29

29. State how, the date when, and under what circumstances the trust is to be, or may be, terminated as an entirety.

Paragraph 24 of the Trust Agreement provides as follows:

"24. (a) The trust hereby created shall continue for a period of twenty-one years from the date hereof unless sooner terminated in the manner hereinafter set forth. If at the expiration of said twenty-one year period, this trust has not been liquidated in some manner herein provided, the Trustee then in office, then, immediately shall proceed to liquidate and wind up the affairs of said Trust and shall distribute to the registered holders of the participation trust certificates, after all proper liquidation expenses and other expenses and claims have been paid, the property, or the proceeds from the sale of the property of the trust. In thus liquidating and winding up said trust and its properties, the Trustee shall have the absolute right to sell or dispose of the whole or any part of said properties, either at public or private sale, without consulting or procuring the consent of the registered holders of the participation trust [fol. 65] certificates or the consent of any one of them, the same as though the properties were the individual properties of the Trustee and anyone purchasing any part thereof shall not be required to make inquiry in any way whatsoever, either as to the right or authority of the Trustee to make the sale, or to make inquiry as to the manner in which the Trustee intends to handle, distribute or dispose of the proceeds derived from the sale of the properties or any part thereof. Before a holder of participation trust certificates shall be entitled to receive his or her proportionate part of the proceeds or of the properties upon liquidation said holder shall be required to surrender a certificate or certificates representing his or her right or rights of participation.

"(b) The Trustee may sell and convey all or any part of the trust property upon receiving in advance the written consent to such sale and conveyance from the owners of two-thirds in amount of the participation trust certificates in this trust then issued and outstanding, but notwithstanding such consent, the Trustee shall not be obliged so to do.

"(c) The Trustee may liquidate and wind up this trust and make a sale of all of its property or may distribute all of its property to the holders of participation trust certificates in such manner and at such times prior to the expiration of the twenty-one year period as the owners of two-thirds in amount of the participation then issued and outstanding may consent in writing, but notwithstanding such [fol. 66] consent, the Trustee shall not be obliged so to do."

33. Describe the method by which notice is to be given the holders of certificates of the termination or proposed termination of the trust as an entirety.

No method is provided for giving notice to the holders of certificates of the termination of the trust as an entirety where it is to be terminated by expiration of the 21 year limitation expressed therein. No provision is given for notice to the holders of certificates of the termination prior to the limitation period; but the holders of ⅔ in amount of the aggregate value of certificates issued and outstanding must consent to such earlier termination of the trust.

34. Explain what disposition is to be made of unclaimed funds upon the termination of the trust. When will such funds be regarded as unclaimed so as to permit of their disposition?

No provision is made with respect to unclaimed funds upon the termination of the trust. No provision is made as to what time must elapse before the funds will be regarded as unclaimed.

35. State the percentage that the aggregate annual maintenance charges and deductions bear to the dividend and interest income from the trust property on the basis of dividend and interest income thereon during the 3 latest fiscal years, year by year, or, if the trust has not been in existence for such period, then the period for which the trust has been in existence, year by year. If the date of the filing of the registration statement is more than 90 days after the close of the last fiscal year, submit a similar statement [fol. 67] from such closing date to the latest practicable date.

The trust has not been in existence and no percentage can be given.

36. State the method by which the price of the certificates to be sold is calculated, giving a full statement of all

of the component parts thereof including the so-called "service" or "loading" charge.

The price of the certificates to be sold is calculated on the declared value of the property conveyed to the Trustee, the stated aggregate value of the certificates to be issued equaling the declared value of the property conveyed to the Trustee. No "service" or "loading" charge is provided for; but properties are selected by the Depositor, who is also the Sponsor, and paid for by him and conveyed to the Trustee at a value declared by the Depositor, who is also the Sponsor.

37. Explain what adjustments are made in the offering price to absorb any variation between the price as computed according to item 36 and the actual offering price.

No adjustments are provided for in the offering price to absorb any variation between the price as computed according to Item 36 and the actual offering price. The price computed according to Item 36 is the declared value of the properties, the declaration of values being made by J. Edward Jones, the Depositor, who is also the Sponsor.

38. State the "service" or "loading" charge in terms of a percentage of the actual market value of the underlying securities, as of a date within 15 days prior to the fil- [fol. 68] ing of this registration statement. If odd-lot premiums, commissions, or the like, are included in the determination of the market value of the underlying securities, make a specific statement to that effect, explaining concisely the basis upon which such premiums, commissions, or the like are computed.

There are no underwriting securities vested in the Trustee.

39. Name the person or classes of persons participating, directly or indirectly, in the "service" or "loading" charge, and state the percentage of such charge received by each.

No "service" or "loading" charge is provided for. J. Edward Jones, the depositor and Sponsor, will participate in and will be entitled to any profit arising between the purchase price of the properties by him and the declared value at which the properties are conveyed to the Trustee.

40. If any component part of the offering price consists of brokerage, commissions, odd-lot premiums, or other items of expenditure (other than the service or loading charge),

state whether the items named are actually paid by the depositor or sponsor, and, if not, explain fully.

No brokerage commissions or odd lot premiums or other items of expenditure are provided for.

41. State the percentage that the odd-lot premiums, included in the value of the underlying securities comprising a unit, bear to the market value of the underlying securities, as of a date within 15 days prior to the filing of this registration statement, excluding from such value the odd-lot premiums but including therein customary round-lot [fol. 69] brokerage or commissions. If such percentage, when charged against any particular underlying security, exceeds 5 percent of the value of such security (computed as above), name such securities and the percentage charged against each.

There are no underlying securities.

42. Give the dates of, parties to, and general effect of, every material contract affecting, directly or indirectly, the trust which contract is to be performed in whole or in part at or after the filing of this registration statement.

The Trust Agreement is the only material contract now in existence which affects the trust directly or indirectly. The Trust Agreement is dated May 2, 1935 and is between J. Edward Jones, the Depositor and Sponsor, and American Charter Co., the Trustee. J. Edward Jones agrees to convey to the Trustee free, clear and unencumbered properties of the value of $100,000., and the Trustee is to issue certificates to him or to his nominees from time to time which equal in value, at the stated value of $100. per unit, the property conveyed by him to the Trustee. Unless properties to the declared value of $100,000. are conveyed to the Trustee within one year from the date of the Trust Agreement no more will be conveyed to the Trustee and the certificates issued and outstanding at any time will equal only the declared value of the properties conveyed to the Trustee (See paragraphs 1 and 51 of the Trust Agreement).

43. Describe briefly the frequency, nature, and scope of reports to certificate holders.

Certificate holders will receive a report each time a [fol. 70] periodic distribution is made of receipts and expenditures; an annual audit will be made and a concise report thereof forwarded to the certificate holders annually.

44. Give the name and address of the independent certified or public accountant, if any, preparing and certifying audits or examinations of accounts of the depositor and of the trust property, together with the scope, frequency, and regularity thereof.

Frederick M. Scholz, 15 East 42nd Street, New York, N. Y. Audit will be made annually of accounts of the Depositor with respect to the trust property and of the trust property, and will cover all receipts, expenses, reserves and disbursements.

45. Describe briefly the general plan for the distribution of the certificates for which this registration statement is filed.

As and when the properties are conveyed to the Trustee, as provided in the Trust Agreement, the Trustee delivers to the Trustor, J. Edward Jones, who is also the Depositor and Sponsor, certificates equal in value to the declared value of the properties conveyed, or delivers such certificates to a person designated by him. The certificates are sold by or through J. Edward Jones to the investing public at the stated value of $100 per each certificate, the cost of the sale and the commissions therefor being paid wholly by J. Edward Jones, Trustor.

46. If there is any variation in the price at which any portion of the certificates is proposed to be offered to any [fol. 71] person or classes of persons (other than the underwriters), give a list of such persons or classes of persons, naming them, and state the amount of such variation or variations.

There is no variation in price at which certificates are to be offered.

47. State what reinvestment rights are available to certificate holders.

No reinvestment rights are available to certificate holders.

48. Give details of every denial or restriction by any State regulatory body of the right to sell certificates issued under this trust.

None.

49. Are the certificates for which this registration statement is filed payable in installments, or are investment con-

tracts or similar obligations to be sold in connection with the sale of interests in the trust?

Purchase price of certificates is not payable in installments. No investment contracts or similar obligations to be sold in connection with the sale of interests.

50. If the answer to the question next above is in the affirmative, attach as an exhibit a transcript of an investor's account over the period for which the installment payments or investment contracts run, showing the amount of the monthly or periodical payments, all deductions made therefrom and the purposes therefor, and the amount available for investment. Attach as an exhibit also in parallel columns, as of the end of each installment period, the total amount paid in (computing in such total interest upon the sums paid in at the rate of 3 percent, compounded semi-[fol. 72] annually, less any actual payments made or payable to the investor), and the cash surrender or cancelation value of the investor's rights under the installment purchase plan or investment contract.

51. If more than 25 percent of the total assets of the trust, or of any unit thereof, consists of securities issued by one issuer and/or its subsidiary and/or affiliate, submit all of the data relative to such issuer, subsidiary, and/or affiliate, as would be required by Form A-1, as a separate exhibit, unless such data were originally filed with the Commission as of the time of the issuance of such securities.

None of the assets is to consist of securities issued by the issuer or its subsidiary or affiliate.

Information Concerning the Trustee

52. Name and address of the trustee.

American Charter Co., 800 Citizens Bank Bldg., Wilmington, Delaware.

53. State the initial fees paid or to be paid to the trustee and the source of their payment.

None.

54. State how the continuing charges of the trust, including all periodic fees and expenses, have been and will be paid during the life of the trust, explaining in detail how such charges are determined.

Continuing charges of the trust are to be paid out of income from the trust (See answer to 25 and Supplemental Answer to 25). Charges, except the fixed charges set forth in paragraph 33 (Supplemental Answer 25) cannot be determined in advance but will be determined on the usual and customary charge for such service.

[fol. 73] 55. If any of the fees and charges specified in items 53 and 54 are borne by the depositor or some other person, state that fact specifically and furnish information as to the ability of the depositor or such other person to meet these charges throughout the life of the trust.

None are borne by the Depositor.

56. If there is any arrangement whereby any compensation paid or purported to be paid to the trustee is shared, directly or indirectly, with any other person, set forth the terms and conditions thereof.

None.

57. If the trustee may be removed under the terms of the trust agreement, state by whom, how, and under what circumstances.

No provision provided for removal of the Trustee under the terms of the Trust Agreement.

58. If the trustee may resign under the terms of the trust agreement, state how and under what circumstances.

The Trustee may resign at any time.

59. In the event of the removal or resignation of the trustee, state the procedure for the appointment of a successor and state who bears the expense thereof. In the absence of any trustee, state the procedure to be followed.

See Supplemental Answer.

60. State briefly the duties and responsibilities of the trustee, and any express limitation on the liability of the trustee, including the provisions of the trust agreement, if [fol. 74] any, in respect to matters on which the trustee may be entitled to rely on opinion of counsel.

See Supplemental Answer.

61. Furnish information as to the ability of the trustee to perform the duties imposed upon him under the trust.

American Charter Company is a corporation having perpetual existence and is organized under the laws of the State of Delaware and doing business therein.

62. If any duties and responsibilities (other than clerical or purely ministerial) imposed upon or required of the trustee in connection with the proper conduct of the trust are performed by others than the trustee, state the character of such duties and by whom performed.

No duties other than clerical and ministerial are performed by anyone other than the Trustee; the Trustee being a corporate entity, its duties may be performed by the officers of the corporate Trustee.

63. Furnish information as to the ability of the persons to perform the duties and responsibilities mentioned in item 62 throughout the life of the trust.

The life of the trust is limited to 21 years. The corporate Trustee has perpetual existence.

Information Concerning the Depositor

64. Name and address of the depositor.

J. Edward Jones, 342 Madison Ave., New York, N. Y.

65. Form and style of the organization of the depositor, such as individual, corporation, partnership, etc.

Individual.

[fol. 75] 66. Name of the State or other sovereign power under which the depositor is organized or incorporated.

Not applicable as Depositor is individual.

67. Names and addresses of the directors of the depositor or persons performing similar functions and of its chief executive, financial, and accounting officers, specifying the office held by each.

Name	Address	Office held
None.	.....	.....

68. If the depositor is a partnership, state the name and address of each partner.

Name	Address
Not a partnership	.....

Supplemental Answer 59

59. In the event of the removal or resignation of the Trustee, state the procedure for the appointment of a suc-

cessor and state who bears the expense thereof. In the absence of any Trustee, state the procedure to be followed.

No provision is made for the removal of the Trustee and none for the appointment of a successor Trustee in the event of removal. In the event of the resignation of the Trustee the five holders of record highest in amount of [fol. 76] participation trust certificates select a temporary Trustee. The temporary Trustee gives notice to the certificate holders and suggests the name of a corporate Trustee to be appointed as permanent successor Trustee. The holders of certificates of a majority in an aggregate amount of certificates issued and outstanding may reject the Trustee so selected and if such rejection is made the temporary Trustee in the same manner proposes another until one is selected that meets the approval of a majority in amount of the holders of certificates then issued and outstanding. Unless objections are made by holders of a majority in value of certificates then issued and outstanding to the Trustee selected within ten days, the Trustee so selected by the temporary Trustee becomes successor Trustee.

See paragraph 35 of the Trust Agreement.

Supplemental Answer 60

60. State briefly the duties and responsibilities of the Trustee, and any express limitation on the liability of the Trustee, including the provisions of the Trust Agreement, if any, in respect to matters on which the Trustee may be entitled to rely on opinion of counsel.

The trustee is to receive and collect the proceeds derived from the sale of oil from the oil royalties comprising the trust and is liable only for bad faith in matters affecting the trust. The Trustee is entitled to rely upon advice of counsel with respect to any matters arising under the Trust Agreement.

The provisions of the Trust Agreement with respect thereto are as follows:

[fol. 77] "27. The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with this trust, except its own wilful misconduct or gross negligence.

"28. The Trustee shall not be under any obligations to institute, appear in, conduct or defend any suit or litigation or to take any action towards the execution or the enforcement of the trust hereby created, which in its opinion will be likely to involve it in expense or liability unless one or more of the holders of the participation trust certificates shall as often as required by the Trustee, furnish indemnity satisfactory to the Trustee against such expense or liability: Anything herein contained to the contrary notwithstanding, the foregoing provisions of this paragraph are intended only for the protection of the Trustee, and shall not be construed to limit or affect any discretion or power by any provision of this indenture given to the Trustee to determine whether or not it shall take action in respect of any default, or any power or discretion of the Trustee to take action in respect of any default, notwithstanding the lack of notice or request to do so from the holders of the participation trust certificates herein.

"29. The Trustee shall incur no liability to anybody in acting upon any notice, request, consent, certificate, note, [fol. 78] document or paper believed by it to be genuine and to have been signed by the proper person.

"30. The recitals and statements herein and in the participation trust certificates contained shall be taken as statements by the Trustor and shall not be considered as made by or imposing any obligations or liability upon the Trustee herein.

"31. The Trustee shall not be held responsible for the title or value of any property or for the validity of any deed or instrument herein referred to, and it shall not be under any duty to inform itself as to the value of such property or validity of such deed, nor shall the Trustee be held responsible for the proper recording of any deeds or other instruments, or for the sufficiency of any transfer orders from the Trustor or acceptance or recognition thereof by any Pipe Line Company.

"32. The Trustee may employ agents and attorneys in the execution of the trusts hereof and may consult with legal counsel, including counsel of the Trustor, and any action under this indenture taken or suffered in good faith by the Trustee in accordance with the opinion of such counsel shall be conclusive in favor of the Trustee as against the Trustor and all holders of participation trust cer-

tificates, and shall fully protect the Trustee in respect thereof."

69. Give the amount of shares in the trust owned of record [1] and beneficially, if known, by each of the directors of the depositor or persons performing similar functions, and [fol. 79] by its chief executive, financial and accounting officers as of a date within 15 days prior to the filing of the registration statement, and, if possible, as of 1 year prior thereto.

As of a date within 15 days prior to the filing of the registration statement.

Name	Position in organization	Kind of security	Number	Aggregate liquidating value
None	.....	.....	.....	.....

As of a date approximately 1 year prior to the date named above:

Name	Position in organization	Kind of security	Number	Aggregate liquidating value
None	.....	.....	.....	.....

70. What other trust issues has the depositor created?

See Supplemental Answer.

71. Under which of the trust issues mentioned in 70 is the depositor still creating trust certificates?

No additional trust certificates are now being created in any of the trusts mentioned in 70. It is contemplated that additional Certificates will be issued under Series "L" upon the conveyance of additional property to the Trustee thereunder.

[fol. 80] 72. If any of the directors (or persons performing like functions), partners, or officers of the depositor are directors, partners, or officers of any person issuing securities held in the trust, name such directors, partners, and officers and state their relationship to such persons.

None.

73. If any of the directors (or persons performing like functions), partners, or officers of the depositor are di-

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[1] Record as used herein, wherever bearer certificates are employed, shall be the equivalent of registration.

rectors, partners or officers (or were directors, partners, or officers at the time of the underwriting herein mentioned) of any person who was an underwriter to any of the securities held in the trust, name such directors, partners, and officers and state their relationship to such person.

None:

74. Give a statement of the total remuneration, paid or estimated to be paid, by the depositor, its subsidiaries or affiliates, or their predecessors, directly or indirectly, during the past and ensuing year to each director (or person performing similar functions), and also whenever the total remuneration from all such sources paid or estimated to be paid to any other person exceeds $25,000 per year, name each such person and state each such amount.

Name	Office	Total remuneration	
		During past year	During ensuing year
None	.....	.....	.....

[fol. 81]. Supplemental Answer 70

70. What other trust issues has the depositor created?

Name of Trust	Date of Trust Agreement	Amount Authorized	Amount Issued	Amount Unissued
Series "A"	3/31/30	$100,000.	$99,500.	$500.
Series "B"	9/10/30	100,000.	99,500.	500.
Series "C"	12/23/30	100,000.	72,000.	28,000.
Series "D"	8/12/31	100,000.	100,000.	.....
Series "E"	3/18/32	100,000.	100,000.	.....
Series "F"	9/12/33	100,000.	98,500.	1,500.
Series "G"	2/ 1/34	100,000.	100,000.	.....
Series "H"	2/13/34	100,000.	79,400.	20,600.
Series "I"	4/26/34	100,000.	100,000.	.....
Series "J"	8/19/34	100,000.	36,700.	63,300.
Series "K"	11/22/33	100,000.	100,000.	.....
Series "L"	3/ 2/35	100,000.	7,700.	92,300.
Maraydun No. 1 "A"	10/ 1/34	30,000.	30,000.	.....
Maraydun No. 1 "B"	10/ 1/34	16,000.	16,000.	.....
Stamper No. 1 "A"	1/15/35	50,000.	50,000.	.....
Stamper No. 1 "AA"	1/15/35	20,000.	20,000.	.....
Stamper No. 1 "B"	1/15/35	40,000.	40,000.	.....
Stamper No. 1 "BB"	1/15/35	40,000.	40,000.	.....
Cooper No. 1 "A"	1/22/35	50,000.	50,000.	.....
Cooper No. 1 "B"	1/22/35	40,000.	40,000.	.....
Cooper No. 1 "BB"	2/ 1/35	40,000.	40,000.	.....
Consolidated "A"	10/18/34	100,000.	.....	100,000.

Series "A" to Series "L", both inclusive, are proceeded by "J. Edward Jones Royalty Trust".

City Bank Farmers Trust Company, Trustee for Series "A", "B" and "C".

American Charter Company, Trustee for Series "D", "E", "F", "G", "H", "I", "J", "K", "L", Maraydun No. 1 "A" and Maraydun No. 1 "B".

Oil Finance Corporation, Trustee for Stamper No. 1 "A", Stamper No. 1 "AA", Stamper No. 1 "B", Stamper No. [fol. 82] 1 "BB", Cooper No. 1 "A", Cooper No. 1 "B", Cooper No. 1 "BB" and Consolidated "A".

75. Give the names and addresses of the 10 largest certificate holders of record[1] and/or beneficially, if known, of the trust as of a date within 15 days prior to the filing of this registration statement, and, if possible, as of a date approximately 1 year prior thereto, naming them and the respective amounts held.

As of a date within 15 days prior to the filing of this registration statement:

	Name	Number of shares held[2]	Aggregate liquidating value thereof
1	None		
2			
3			
4			
5			
6			
7			
8			
9			
10			

[fol. 83] As of a date within 1 year prior to the date given above:

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[1] Record as used herein, wherever bearer certificates are employed, shall be the equivalent of registration.

[2] The beneficial holdings, where known, should be included with the record holdings in order to determine the position of the stockholder as one of the 10 largest.

	Name	Number of shares held[2]	Aggregate liquidating value thereof
1	None		
2			
3			
4			
5			
6			
7			
8			
9			
10			

76. State whether the depositor can assign his rights and obligations under the trust agreement, and, if so, under what conditions.

Depositor cannot assign his obligations under the Trust Agreement. While no provision is made for the assigning of his rights to receive participation trust certificates upon the conveyance of property, it is probable that these rights are assignable as he may direct the Trustee to issue certificates to him or to his nominee.

77. If the sponsor of the certificates for which this registration statement is filed is other than the depositor, give information concerning the sponsor, not hereinbefore required, similar to that concerning the depositor in items 64 to 76, inclusive.

Depositor and Sponsor are the same person.

[fol. 84] Exhibits Required to Accompany this Statement

A. A copy of the trust agreement or indenture covering the certificate for which this registration statement is filed.

B. Copies of all contracts referred to in item 42.

C. A copy of the certificates for which this registration statement is filed.

D. A copy of the "price make-up sheet" showing the calculation of the offering price required under item 36.

E. Copies of any contracts or class of contracts used or to be used between the sponsor or depositor and underwriter or dealers relating to the sale or distribution of the certificates for which this registration statement is filed.

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[2] The beneficial holdings, where known, should be included with the record holdings in order to determine the position of the stockholder as one of the 10 largest.

F. A copy of the certificate of incorporation of the depositor with all amendments thereto. If the depositor is not a corporation submit corresponding documents.

G. A copy of the bylaws of the depositor with all amendments thereto.

H. Copies of orders of all State regulatory bodies by which any certificates of the trust were or are denied or restricted in the right to be sold, mentioned in item 48.

I. A copy of the legal opinion, respecting the legality of the certificates for which this registration statement is filed.

J. The consent of counsel for the use of the opinion mentioned in exhibit I.

[fol. 85] K. The consent of the accountant to use any balance sheet and profit and loss statements included in this registration statement.

L. Consent of any other expert named as having prepared or certified any part of this registration statement, or as having prepared or certified a report or valuation for use in this registration statement, for the use of such statement, report, or valuation.

M. Copy of latest report to certificate holders.

N. Any other exhibits deemed material to the subject matter of this registration statement.

O. Submit a balance sheet of the trust assets and liabilities as of a date not more than 90 days prior to the date of the filing of this registration statement. If such balance sheet be not certified by an independent public or certified accountant, in addition to such balance sheet, submit a balance sheet of the trust assets and liabilities certified by an independent public or certified accountant of a date not more than 1 year prior to the filing of this registration statement. Such balance sheets shall be in a form substantially as follows:

[fol. 86] Balance Sheet

Statement of Trust Assets and Liabilities

Assets:[1]

Stocks at market.[2]
Bonds at market.[2]
Other securities at market.[2]
Accrued interest.
Accrued dividends.
Stock dividends.[3]
Stock rights.[3]
Stock splitups (held as receivables).[3]
Cash in hands of trustee.
Other assets (specify).

Liabilities and Capital:

Trust certificates outstanding (number and value).
Funds to be distributed to certificate holders at next distribution date.
Reserves.
Other liabilities (specify).
Surplus.

Auditor's Certificate

Submit here certification by an independent public or certified accountant in accord with article 15 of the Commission's rules.

P. Submit profit and loss statements of the trust for the latest fiscal year for which such statement is available and for the two preceding fiscal years. If the date of the fil- [fol. 87] ing of the registration statement is more than six months after the close of the last fiscal year, submit a statement from such closing date to the latest practicable date.

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[1] Furnish also a complete list of the companies whose securities compose the trust property, showing the number and kind of the securities of each company and the market price as of the date of the balance sheet.

[2] Furnish also the cost price of these securities.

[3] State the basis for the valuation of these assets.

Such statements shall be certified by an independent public or certified accountant. Such statements shall be in a form approximately as follows:

Profit and Loss Statement of the Trust

Income:

Interest earned.
Cash dividends.
Sale of stock dividends, rights, etc.
Profit or loss on sale of capital assets (supply supporting schedule).
Other income (specify).

Total Income

Expenses:

Taxes.
Trustee's fees.
Trustee's expenses.
Insurance.
Legal.
Auditing.
Other expenses (specify).

Total Expenses

Net Income:

Disposition of above net income.
Dividends to be distributed.
Transfers to surplus and reserve (specify).
Other distributions to be made (specify).
Balance.

[fol. 88] Auditor's Certificate

Submit here certification by an independent public or certified accountant in accord with article 15 of the Commission's rules.

Q. Submit balance sheets of the depositor and/or sponsor as of the last day of the fiscal year prior to the filing of the registration statement for which year a balance sheet has been prepared, and if such day is more than ninety

days prior thereto, a balance sheet of a date within ninety days prior thereto. Such balance sheets shall be in a form substantially as follows:

Balance Sheet of Depositor

Assets:

Cash (including time deposits and call loans).
Accounts receivable.
Notes receivable.
Marketable securities (at cost).
Securities of trust (at cost).
Special deposits.
Investments in affiliated companies.
Due from affiliated companies.
Furniture and fixtures.
Deferred charges.

Total Assets

Liabilities and Capital:

Notes or loans payable—Banks.
Notes or loans payable—Others.
Accounts payable—Dealers.
[fol. 89] Accounts payable—Others.
Due to affiliated companies.
Reserves.
Capital stock:
Preferred.
Less Treasury stock.
Common.
Less Treasury stock.

Total Outstanding Stock

Surplus:

Paid in surplus.
Capital surplus.
Earned surplus.

Total Liabilities and Capital

Auditor's Certificate

Submit here certification by an independent public or certified accountant in accord with article 15 of the Commission's rules. Such certification may be of one only of the foregoing balance sheets, but that one must be as of a date not more than fifteen months prior to the date of the filing of this registration statement.

R. A copy of the form of prospectus proposed to be issued in connection with the certificates for which this registration statement is filed and a copy of complete reconciliation and tie-up with the Registration Statement, prepared in accordance with Articles 16 and 17 of the Rules and Regulations.

[fol. 90] J. Edward Jones Royalty Trust

Series "M"

Trust Agreement

J. Edward Jones and American Charter Company

This Agreement, dated this 2nd day of May, 1935, made by and between J. Edward Jones, whose address is #342 Madison Avenue, City of New York, County of New York and State of New York, hereinafter called the Trustor, party of the first part; American Charter Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its office at #800 Citizens Bank Building, City of Wilmington, County of New Castle and State of Delaware, hereinafter called the Trustee, party of the second part, and the registered holders of Participation Trust Certificates, parties of the third part,

Witnesseth:

1. That for and in consideration of the sum of Ten ($10.00) Dollars, to him duly paid by the Trustee at or before the ensealing of these presents, the fulfillment of the conditions and covenants hereinafter contained, and for other good and valuable considerations, the receipt whereof is hereby acknowledged by the Trustor, the Trustor hereby

agrees and covenants to grant, bargain, sell, alien, remise, convey, confirm, assign, transfer and set over unto the [fol. 91] Trustee, and to its successors and assigns forever, properties commonly known as Oil Royalties of the total value of One Hundred Thousand ($100,000.00) Dollars, (subject to the closing of this Trust before the full $100,000.00 has been conveyed to the Trustee, as herein provided) together with all income, rents, issues, profits, royalties, claims and demands thereunto belonging or in any wise appertaining, and also all and every other estate, right, title and interest, property and appurtenances which the said Trustor may have in the said properties, including the transfer orders appurtenant thereto.

2. To have and to hold the same unto the said Trustee, its successors and assigns.

3. In trust, nevertheless, for the benefit, use and advantage of the persons, corporations, firms and partnerships who may be or become holders of the Participation Trust Certificates to be issued and delivered as hereinafter set forth, and for the enforcing of any and all rights, inuring to the owners or holders of said Participation Trust Certificates, in accordance with the true intent and meaning of the stipulations and covenants of this agreement and of said Participation Trust Certificates.

4. As deeds executed by the Trustor purporting to transfer to the Trustee property of the kind above mentioned are delivered to the Trustee, the Trustee shall forward the said deeds to the County Clerks of the Counties and States wherein the lands described in said deeds are situated, for the purpose of having said deeds duly recorded in the Trustee's name. The Trustee shall also execute and forward to [fol. 92] the Pipe Line Companies designated therein all transfer orders received from the Trustor in connection with the aforesaid properties, to the end that the account of the Trustee may be placed in line for payment; and in connection with or as a part of any such transfer orders the Trustee is hereby expressly authorized and empowered to execute, enter into or assume as Trustee any covenants, warranties or agreements, whether of title or otherwise, or consent to any conditions, which the Pipe Line Company may demand or require, and any and all such covenants, warranties, agreements or conditions shall attach to and

be binding upon the Trust property. The Trustee is further given full power and authority to execute and deliver any and all other instruments or documents and to do any and all things that may be necessary to effectuate the transferring of any and all rights in said properties to the Trustee herein.

5. Upon the return of the deeds to the Trustee showing the recordation and registration thereof in the name of the Trustee, the Trustee shall issue Participation Trust Certificates not exceeding in total the value, as declared by the Trustor, of the property described in said deed or deeds so recorded, each certificate to be for a multiple of One Hundred ($100.00) Dollars and in no case is a certificate to be issued for any other denomination, and the Trustee shall issue in the name of and deliver the said Participation Trust Certificates to the Trustor or his nominee or nominees.

6. The Participation Trust Certificates herein mentioned shall be substantially in the following form:

[fol. 93] J. Edward Jones Royalty Trust

Series "M"

Participation Trust Certificate

$—. Certificate No. M —.

This is to certify that —— ——, the registered holder hereof, is the owner of — dollars undivided participation interest in and to the properties embraced under the trust agreement executed by and between J. Edward Jones, #342 Madison Avenue, New York City, and American Charter Company, #800 Citizens Bank Building, Wilmington, Delaware, as Trustee on the — day of ——, 1935. Such interest entitles the registered holder to share with the registered holders of other certificates of the same series which may be issued under the said agreement, in the net income, net profits and net proceeds of all of said properties, according to the ratio which the face value hereof bears to the total face value of all of the certificates at any time outstanding.

Participation Trust Certificates are transferable in amounts of $100.00 or multiples thereof, but only on the

books of the Trustee and when properly endorsed; and the registered holders of such certificates issued under said Trust Agreement as shown on said books at the close of the last business day of each calendar month, shall be entitled to distribution of income made by the Trustee under the said Trust Agreement during the next succeeding calendar month.

The rights of the holders of Participation Trust Certificates and the rights and obligations of the Trustee are fully set forth in the said Trust Agreement, a copy of which [fol. 94] is on file with the Trustee at its office, #800 Citizens Bank Building, Wilmington, Delaware, and the holder hereof, by accepting this Participation Trust Certificate, agrees to all the terms and conditions contained in said Agreement.

Dated Wilmington, —— —, ——.

American Charter Company, Trustee; by —— ——, President or Vice President.

For Value Received, I/We —— —— hereby sell, assign and transfer unto —— —— an interest of — Dollars, in and to this Participation Trust Certificate, and do hereby irrevocably constitute and appoint —— —— an attorney in fact to transfer the said interest on the books of the Trustee, with full power of substitution in the premises.

Dated —— —, ——.

—— ——.

In the presence of —— ——.

7. The rights of the holders of the said Participation Trust Certificates shall be solely as set forth in the said certificates and in this agreement, and the acceptance of such Participation Trust Certificates or any of them shall constitute assent to each and every provision of this Agreement and of such Participation Trust Certificates by the [fol. 95] holder thereof, with the same force and effect as if such registered holder had executed and delivered this Agreement in person and individually named as a party thereto.

8. All Participation Trust Certificates issued hereunder shall have equal standing without priority as to one another, irrespective of the date of issue, and each Participation Trust Certificate shall share in all distributions of the trust made after its issue, according to the ratio which the

face amount of the Participation Trust Certificate bears to the total face amount of all certificates at any time outstanding hereunder. Said Participation Trust Certificates issued hereunder shall be executed by the Trustee herein and delivered to the Trustor herein or to any person, corporation, firm or partnership, nominated by and at the request of the Trustor, which request shall be in writing signed by the Trustor and which order of delivery shall be warrant, authority and protection to the Trustee for the issuance and delivery of the said Participation Trust Certificates.

9. Only such of said Participation Trust Certificates as shall be so executed and delivered by the Trustee shall participate in the benefits of this Trust Agreement, and the execution and delivery of such Participation Trust Certificates by the Trustee shall be conclusive evidence that the said Participation Trust Certificates have been duly issued hereunder and are entitled to the benefits of the said Trust hereby created. Said Participation Trust Certificates executed and delivered hereunder shall be transferable only upon the books of the Trustee in accordance with the transfer regulations of the said Trustee.

[fol. 96] 10. The Trustee shall keep books for the registration of said Participation Trust Certificates, in which it shall register, subject to such reasonable regulations as it may prescribe, all of the said Participation Trust Certificates issued hereunder, which books shall contain the names and addresses of the respective registered holders of such Participation Trust Certificates as furnished to the Trustee by such registered holders upon the issuance of such Participation Trust Certificates or upon the subsequent transfer, as the case may be.

11. No transfer of any Participation Trust Certificates shall be valid unless made upon the books of the Trustee by the registered holder thereof in person or by power of attorney duly executed. Upon presentation to the Trustee, at its said office, of any such Participation Trust Certificate duly endorsed by the registered holder thereof and in the proper form for transfer, the Trustee shall transfer said Participation Trust Certificate upon the said books, and shall authenticate and deliver a new certificate or certificates of the said aggregate face value in the name of such transferee. The Trustee may prescribe such regulations in

connection therewith as may be reasonable and may require the endorsement of such registered holders to be duly and suitably guaranteed.

12. The registered holder of any Participation Trust Certificate may transfer any part of the interest represented thereby, in the face amount of One Hundred ($100.00) Dollars or multiples thereof, and in that event the Trustee shall issue a new certificate or certificates to the [fol. 97] transferee representing the face value of the interest transferred, and a new certificate or certificates to the transferor representing the face amount retained.

13. Anything herein to the contrary notwithstanding, the registered holders of Participation Trust Certificates as shown by the books of the Trustee at the close of the last business day of each calendar month, shall be entitled to their pro rata share in all distributions of income made by the Trustee under the trust during the next succeeding calendar month.

14. The registered holder of any Participation Trust Certificate may at any time surrender such certificate to the Trustee for exchange for two or more certificates of the face value of $100.00 or any multiple thereof, not exceeding in the aggregate the face value of the certificate surrendered; and two or more certificates may in the same manner be exchanged for a single certificate of a face value equal to the aggregate face value thereof.

15. In every case of such transfer or exchange the Trustee shall forthwith cancel the surrendered certificates and retain the same, for disposal in its sole discretion.

16. The transferee of any Participation Trust Certificates issued hereunder shall pay for any stamp tax or other government charge connected therewith and shall pay the further sum of twenty-five (25¢) cents for each new Certificate issued, but otherwise there shall be no charge for transfer of certificates. A like charge of twenty-five (25¢) cents. [fol. 98] shall be paid for each new certificate issued upon the exchange of certificates for others of different face value, or representing a portion of a certificate not transferred.

17. The registered holders of the Participation Trust Certificates issued hereunder shall be the only persons hav-

ing any right, title or interest in and to such Participation Trust Certificates and such registered holders shall be recognized as the absolute owners thereof by the Trustee, who shall not be bound by any notice to the contrary, whatsoever. Payments of any and all dividends or distributions of money payable in respect to such Participation Trust Certificates to said holders of Participation Trust Certificates, as hereinafter set forth, or to the prior holders in accordance with paragraph "13" hereof shall be a complete discharge of the Trustee, notwithstanding any notice it may have received to the contrary, be the same expressed or implied or otherwise, of any right, title, interest, claim or demand of any other person, in or to such Participation Trust Certificate dividends, distributions or money.

18. It is hereby agreed that the Trustee shall retain in its possession all of the deeds or other documents of conveyance delivered to it as hereinabove set forth and in pursuance of this Trust Agreement.

19. If any Participation Trust Certificate shall be mutilated, destroyed or lost, a new certificate may be issued and authenticated on such evidence being produced as the Trustee may require, and (in case of mutilation) on the surrender of the old certificate, and (in case of destruction [fol. 99] or loss) on the execution and delivery to the Trustee of such corporate indemnity and guarantee as the Trustee may require. The Trustee shall be paid the sum of Two ($2.00) Dollars for the issuing of a new certificate in place of any such mutilated, destroyed or lost certificate, and the person availing himself of the purpose of this section shall also pay to the Trustee all expenses incident to the investigation of evidence of loss or destruction. All Participation Trust Certificates issued hereunder in lieu of mutilated, lost or destroyed Participation Trust Certificates shall be of like tenor, amount and date, bearing the same serial numbers and the President or Vice-President of the Trustee, for the time being, may sign and certify the same for delivery.

20. The Trustor or his successor or personal representative, shall at all times hereafter, upon reasonable request, make, do, execute and deliver all such other and further reasonable assurances, acts, deeds and things, as may be necessary to carry out the provisions hereof or properly to effec-

tuate the transfer of the above described property to the Trustee or its successors or assigns. The Trustor, for himself, his successors and assigns, further covenants and agrees to and with the said Trustee that the properties he will convey to the said Trustee shall be conveyed free and clear of all encumbrances, and that he will execute any further necessary assurances of the title to said property and will forever warrant said title for the benefit of the Trustee as well as of the registered holders of Participation Trust Certificates.

[fol. 100] 21. All municipal, state and Federal taxes, fees and charges, Trustee's expenses and supervision expenses, shall be a lien upon the property composing the trust fund herein, and/or its income and shall be paid out of the income, if any, and if there be no income, then out of the principal of the trust fund herein. Anything herein to the contrary notwithstanding the Trustee shall have full discretionary powers as to the manner of how, when and from what property or income herein the said taxes, fees and charges may be paid.

22. If at any time there be unpaid any Municipal, State or Federal tax, fee or charge or other fees and/or charges, and there be no income in the hands of the Trustee from which to pay the same, then the Trustee, itself, or by any agent or attorney selected by it, may proceed to sell all or any of the property, the corpus of the trust herein, and all of the right, title, and interest, claim and demand therein, but always only sufficient to discharge such taxes, fees and charges, at public or private sale in the City of New York, or at such other place or places, and at such time or times and upon such terms as the Trustee may fix.

23. Notice of said sale, if public, may be given by publication in one newspaper of general circulation in the Borough of Manhattan, City and State of New York, once a week for four (4) consecutive weeks, the last publication being the date set for the sale. The Trustee may adjourn, from time to time, any public sale hereunder by announcement made at the time and place appointed for such sale or adjourned sale [fol. 101] and without further notice or publication it may make such sale at the time and place to which the same shall be so adjourned.

24. (a) The trust hereby created shall continue for a period of twenty-one years from the date hereof unless sooner terminated in the manner hereinafter set forth. If at the expiration of said twenty-one year period, this Trust has not been liquidated in some manner herein provided, the Trustee then in office, then, immediately shall proceed to liquidate and wind up the affairs of said Trust and shall distribute to the registered holders of the Participation Trust Certificates, after all proper liquidation expenses and other expenses and claims have been paid, the property, or the proceeds from the sale of the property of the Trust. In thus liquidating and winding up said Trust and its properties, the Trustee shall have the absolute right to sell or dispose of the whole or any part of said properties, either at public or private sale, without consulting or procuring the consent of the registered holders of the Participation Trust Certificates or the consent of any one of them, the same as though the properties were the individual properties of the Trustee and anyone purchasing any part thereof shall not be required to make inquiry in any way whatsoever, either as to the right or authority of the Trustee to make the sale, or to make inquiry as to the manner in which the Trustee intends to handle, distribute, or dispose of the proceeds derived from the sale of the properties or any part thereof. Before a holder of Participation Trust Certificates shall be entitled to receive his or her proportionate part of the proceeds or of the properties upon liquidation said holder shall [fol. 102] be required to surrender a Certificate or Certificates representing his or her right or rights of Participation.

(b) The Trustee may sell and convey all or any part of the Trust property upon receiving in advance the written consent to such sale and conveyance from the owners of two-thirds in amount of the Participation Trust Certificates in this Trust then issued and outstanding, but notwithstanding such consent, the Trustee shall not be obliged so to do.

(c) The Trustee may liquidate and wind up this Trust and make a sale of all of its property or may distribute all of its property to the holders of Participation Trust Certificates in such manner and at such times prior to the expiration of the twenty-one year period as the owners of two-thirds in amount of the Participation then issued and outstanding may consent in writing, but notwithstanding such consent, the Trustee shall not be obliged so to do.

25. The Trustee shall apply the proceeds of any sale of the trust property herein as follows:

1. The payment of all taxes, charges, fees, costs and disbursements and expenses incurred by the Trustee, including all attorneys' fees.

2. The division of the balance, if any, among the record holders of said Participation Trust Certificates, pro rata as their interest may appear.

26. All rights of action under this indenture or under any of the property composing the corpus of this trust herein [fol. 103] can only be enforced by the Trustees hereunder, which rights of action may be enforced without the possession of any such Participation Trust Certificate or the production thereof at the trial or other proceedings relative thereto and any such suits or proceedings instituted by the Trustee shall be brought in its name as Trustee and any recovery of judgment shall be added to the corpus of the trust or distributed as hereinabove set forth as the source and nature of such recovery in the determination of the Trustee may require.

27. The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with this trust, except its own wilful misconduct or gross negligence.

28. The Trustee shall not be under any obligations to institute, appear in, conduct or defend any suit or litigation or to take any action towards the execution or the enforcement of the trust hereby created, which in its opinion will be likely to involve it in expense or liability unless one or more of the holders of the Participation Trust Certificates shall as often as required by the Trustee, furnish indemnity satisfactory to the Trustee against such expense or liability. Anything herein contained to the contrary notwithstanding, the foregoing provisions of this paragraph are intended only for the protection of the Trustee, and shall not be construed to limit or affect any discretion or power by any provision of this indenture given to the Trustee to determine whether or not it shall take action in re- [fol. 104] spect of any default, or any power or discretion of the Trustee to take action in respect of any default, not-

withstanding the lack of notice or request to do so from the holders of the Participation Trust Certificates herein.

29. The Trustee shall incur no liability to anybody in acting upon any notice, request, consent, certificate, note, document or paper believed by it to be genuine and to have been signed by the proper person.

30. The recitals and statements herein and in the Participation Trust Certificates contained shall be taken as statements by the Trustor and shall not be considered as made by or imposing any obligations or liability upon the Trustee herein.

31. The Trustee shall not be held responsible for the title or value of any property or for the validity of any deed or instrument herein referred to, and it shall not be under any duty to inform itself as to the value of such property or validity of such deed, nor shall the Trustee be held responsible for the proper recording of any deeds or other instruments, or for the sufficiency of any transfer orders from the Trustor or acceptance or recognition thereof by any Pipe Line Company.

32. The Trustee may employ agents and attorneys in the execution of the trusts hereof and may consult with legal counsel, including counsel of the Trustor, and any action under this indenture taken or suffered in good faith by the Trustee in accordance with the opinion of such counsel shall [fol. 105] be conclusive in favor of the Trustee as against the Trustor and all holders of Participation Trust Certificates, and shall fully protect the Trustee in respect thereof.

33. The Trustee shall have and it is hereby granted a first lien upon all of the trust property herein, for all its fees, charges, etc., which shall be as follows:

From the Trustor:

1. Attorney and counsel fees in connection with this agreement or in connection with any matter arising thereunder including counsel fees for the preparation of this trust agreement for the preparation and filing of any registration statement or prospectus with state or federal authorities; provided that the expenses for counsel fees in the preparation of this trust agreement and in completing the preparation of the registration statement, the

prospectus or other documents to be filed with said state or federal authorities and all other services up to the time that any said registration statement shall become effective shall not exceed the sum of $5,000.00.

2. All disbursements for the recordation of all documents to be registered in accordance with the terms of this agreement.

3. $1.00 per each certificate issued by the Trustee.

From the trust property or its income:

4. For the maintenance of each account upon books of the Trustee—25¢ per annum.

[fol. 106] 5. For the payment or distribution of the income or receipts of this trust to the certificate holders—5% of the gross receipts or income. Said 5%, however, shall not be less than the sum of 15¢ per check issued by the Trustee.

6. For all out of pocket expenses of the Trustee, including postage, books of account, checks, stationery and other necessary supplies used in connection with the administration of the Trust.

34. The Trustee, at will, may resign by giving a two months' written notice to the record holders of the Participation Trust Certificates herein, specifying the date such resignation shall take effect and containing the names of five (5) holders of record highest in amount of Participation Trust Certificates hereunder. Such resignation shall take effect on the date specified in such notice and the Trustee herein shall not be required to do any other thing save that of delivering the trust property and trust books herein to the successor trustee when, if and as such be appointed. No delivery of property herein shall be made until all of the fees, disbursements, charges and costs, including attorneys' fees, incurred by said Trustee shall have first been paid.

35. The five (5) record holders aforesaid, or a majority of them, may appoint a temporary Trustee by an instrument or concurrent instruments in writing signed by them and delivered to such temporary Trustee to fill such vacancy until a new Trustee shall be appointed by the

[fol. 107] registered holders of Participation Trust Certificates issued and outstanding hereunder. Such temporary Trustee so appointed shall send notices of such appointment to all of the record holders of the Participation Trust Certificates issued and outstanding hereunder and shall include in said notice the name of a corporation proposed by him for appointment as a Trustee and unless the holders of a majority in amount of Participation Trust Certificates then issued and outstanding shall within ten days after the date of mailing of such notice register an objection thereto the temporary Trustee shall appoint the corporation so named as successor Trustee.

In the event of objection to the corporate trustee so selected, by the holders of a majority in amount of Participation Trust Certificates then issued and outstanding, within ten days after the date of mailing of such notice, the temporary trustee shall select another corporate trustee whose name shall be submitted, as hereinabove provided, and shall continue to select successive corporate Trustees until one is selected against whose appointment no objection as herein provided is made.

36. It is hereby agreed that at all of the times during the life of this trust, all charges, fees, disbursements, and costs, including attorneys' fees, incurred by the Trustee, shall be a lien upon the trust fund, trust property or income of the same herein, until fully paid and satisfied.

37. In the event that a corporation which will accept the office of Trustee herein cannot be found, then the five (5) holders of record highest in amount may organize a cor- [fol. 108] poration under the laws of any state of the United States, which corporation shall be appointed as the successor Trustee which will succeed as Trustee in the manner set forth in paragraph "35" herein.

38. Any such new Trustee appointed hereunder shall execute and deliver to the Trustee last in office, an instrument in writing accepting such appointment hereunder, and thereupon such new Trustee, without any further act, deed or conveyance, shall become vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessors in the trust hereunder, with like effect as if originally named as Trustee herein. On the written request of the new Trustee, but not until the re-

ceipt of full payment of its reasonable compensation, expenses and disbursements as hereinabove provided, the Trustee ceasing to act shall execute and deliver any instrument transferred to such new Trustee upon the trust herein expressed, all the estates, properties, rights, powers and trusts of the Trustee so resigning or removed, and such retiring Trustee shall duly assign, transfer and deliver all the trust property held hereunder by such Trustee to the new Trustee, so appointed, in its place, and shall make, execute, acknowledge and deliver any and all assignments or other instruments in writing reasonably required to vest and confirm to such new Trustee all such property, rights, powers and duties.

39. Any company or corporation to which the Trustee or any successor to it may be merged or consolidated, or any company or corporation resulting from any merger or consolidation of which the Trustee or any successor [fol. 109] shall be a part, shall be the successor Trustee under this agreement without the execution or filing of any paper or any further act on the part of any of the parties hereto.

40. It is hereby covenanted and agreed that no advertisement, circular or other printed matter will be issued herein by any of the parties hereto concerning the Participation Trust Certificates or this agreement, in which the name of the Trustee is mentioned, without first submitting the same to the Trustee and its consent first had and obtained.

41. The Trustor or Trustee may each become the owner or holder of Participation Trust Certificates herein with the same rights as other holders thereof.

42. The Trustee shall not be liable for any payments made or suffered by it to be made in good faith to any governmental authority for taxes upon the cash and/or other property, the subject of this trust, or upon the Participation Trust Certificates, and/or interest, and/or dividends payable thereon herein.

43. The Trustee may rely upon the advice of counsel and upon statements of accountants, brokers or other persons believed by it in good faith to be expert in relation to the matter upon which they are consulted and for anything

done or suffered to be done in good faith based upon such advice and/or information.

44. The Trustee shall not be liable for any representation or information or advice given by any other party [fol. 110] than itself. By no implication and/or construction whatsoever shall any liability be placed upon the Trustee in this agreement except such liability as is expressly assumed by the Trustee.

45. The Trustee shall not be under any duty whatever to inquire into the meaning, application, purpose or effect of any covenant, warrant, agreement or condition which it may enter into, assume or consent to, in connection with or as a part of any transfer order received from the Trustor; and it may enter into, assume and consent to any such covenant, warranty, agreement or condition which may be demanded by any Pipe Line Company, without responsibility therefor to the Trustor or to the holders of Participation Trust Certificates, no matter what may be the meaning, application, purpose or effect thereof, and no matter what notice, actual or constructive, the Trustee may have in respect thereto. And in the event that the Trustee should be held liable to pay to any Pipe Line Company or to any other person or corporation any sum of money because of any such covenant, warranty, agreement or condition, the Trustee shall be entitled to reimburse itself from the trust property, from the income, the principal, or both, in its discretion, for any sum so paid, and also for any expense of investigation or for counsel fees, or otherwise in connection therewith. And if any claim is made against the Trustee because of any such covenant, warranty, agreement or condition, the Trustee may in its uncontrolled discretion compromise or pay such claim, and shall in that event be entitled to like reimbursement. In the event that the trust property shall be insufficient to reimburse the Trustee as in this paragraph and elsewhere [fol. 111] in this instrument provided, the Trustor covenants and agrees to make good the deficiency, and such covenant shall be binding on the executors, administrators, heirs and assigns of the Trustor.

46. Any notice which the Trustee may be required to give herein may be given by the usual first class mail facilities furnished by the United States postal department.

47. Out of the income of the trust fund herein created, the Trustee shall set apart one-half of one per cent as a reserve fund, which reserve fund is to be used first, for the payment of any fee, charge and cost, including attorneys' fees, that may be incurred herein when such cannot be paid from the current income. Upon the said reserve fund reaching the sum of Two Thousand ($2,000.00) Dollars, no more shall be added except to replace disbursements therefrom.

48. The value of properties deeded or to be deeded by the Trustor shall be deemed the value declared by the Trustor to the Trustee, in writing, at the time of the delivery of such deed; and the Trustee shall accept such value in the issuance of Participation Trust Certificates. The total face value of all Participation Trust Certificates at any time outstanding hereunder shall not be more than the total value of the said properties as so declared by the Trustor.

49. All provisions of this agreement are to be read as a whole without reference to numerical, chronological or other sequences.

50. The ownership of Participation Trust Certificates hereunder shall not create any partnership between the [fol. 112] said holder and the Trustee nor between the holder and the Trustor nor between or among the holders of said Participation Trust Certificates nor shall the Trustee have any right or authority to create a partnership between said Trustee and any other person, persons, firm, firms, corporation or corporations with reference to the Trust estate, but at all times, the Trustee shall have the sole and exclusive right and it shall be its duty to manage the business of the Trust estate and no holder of any Participation Trust Certificate issued hereunder shall have any right to interfere with the Trustee's management and control of the Trust estate. No holder of Participation Trust Certificates hereunder shall have the right to require or compel by court action or otherwise the partition or distribution of the assets or property of the Trust estate, or of any part thereof, prior to the termination of the period for which this Trust is created, but Certificate holders may consent thereto in the manner hereinabove set forth.

51. Notwithstanding the covenant of the Trustor to convey to the Trustee oil royalties of the total value of $100,000.00 as set forth in paragraph 1 of this Agreement, unless

within one year from the date of this Agreement, the Trustor has not conveyed oil royalties of the total value of $100,000.00, the Trust shall then be closed and Certificates shall be issued only for the value of properties which have been conveyed to the Trustee at the declared value thereof as set forth in paragraph 48 herein.

In Witness Whereof, the Trustor has set his hand and seal, and the Trustee has caused these presents to be exe-
[fol. 113] cuted by its proper officer and its seal affixed hereto, this 2nd day of May 1935.

(Sgd.) J. Edward Jones, Trustor (L. S.)

Witness (Sgd.) Florence Paine.

American Charter Company, Trustee, by (Sgd.) Harry K. Hoch, Vice President.

Attest (Sgd.) R. J. Brenneisen, Secretary.

STATE OF NEW YORK,
County of New York, ss.:

On this 3rd day of May 1935, before me came J. Edward Jones, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

Florence Aten Ives, Notary Public. (Seal.)

STATE OF DELAWARE,
County of New Castle, ss:

On this 3rd day of May 1935, before me came Harry K. Hoch, to me known, who, being by me duly sworn, did depose and say that he resides in Wilmington, Delaware; that he is the Vice President of the American Charter Com-
[fol. 114] pany, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

(Sgd.) James W. Lattomus, Notary Public. (Seal.)

Certificate No. M. $—.

J. Edward Jones Royalty Trust

Series "M"

Participation Trust Certificate

This is to Certify that —— —— the registered holder hereof, is the owner of — dollars undivided participation interest in and to the properties embraced under the trust agreement executed by and between J. Edward Jones, #342 Madison Avenue, New York City, and American Charter Company, #800 Citizens Bank Building, Wilmington, Delaware, as Trustee on the second day of May, 1935. Such interest entitles the registered holder to share with the registered holders of other certificates of the same series which may be issued under the said agreement, in the net income, net profits and net proceeds of all said properties, according to the ratio which the face value hereof bears to the total face value of all of the certificates at any time outstanding.

Participation Trust Certificates are transferable in amounts of $100, or multiples thereof, but only on the books [fol. 115] of the Trustee and when properly endorsed; and the registered holders of such certificates issued under said Trust Agreement as shown on said books at the close of the last business day of each calendar month, shall be entitled to distribution of income made by the Trustee under the said Trust Agreement during the next succeeding calendar month.

The rights of the holders of Participation Trust Certificates and the rights and obligations of the Trustee are fully set forth in the said Trust Agreement, a copy of which is on file with the Trustee at its office, #800 Citizens Bank Building, Wilmington, Delaware, and the holder thereof by accepting this Participation Trust Certificate, agrees to all the terms and conditions contained in said agreement.

Dated Wilmington, Delaware, —— — ——.

American Charter Company, Trustee, by ——,
Vice-President.

J. Edward Jones, 342 Madison Avenue, New York, N. Y.
American Charter Co., 800 Citizens. Bank Bldg., Wilmington, Delaware.

GENTLEMEN:

I, E. J. Lundy, of the firm of Poe, Lundy & Morgan, 1308 Hunt Bldg., Tulsa, Oklahoma, do hereby certify that I have [fol. 116] prepared, and examined after preparation, the Trust Agreement entered into between J. Edward Jones of 342 Madison Avenue, New York, N. Y., and American Charter Company of 800 Citizens Bank Building, Wilmington, Del., creating the J. Edward Jones Royalty Trust Series "M" and the form of Participation Trust Certificate to be issued thereunder.

I certify that in my opinion these instruments are in all things legal and that holders of Participation Trust Certificates will be entitled to receive their pro rata share of net income, net receipts and net proceeds derived from said J. Edward Jones Royalty Trust Series "M" in accordance with and subject to the provisions of the Trust Agreement of May 2, 1935.

I hereby consent that this letter and certificate respecting the validity of the Trust Agreement and of the said Participation Trust Certificate may be used in the registration of the said securities and of the Participation Trust Certificates to be issued and that said letter and certificate may be and become a part of the Registration Statement and a part of any Prospectus to be issued under or by virtue of said registration.

May 2, 1935. Yours respectfully, E. J. Lundy.

[fol. 117] J. Edward Jones Royalty Trust

Series "M"

New York City, New York

Balance Sheet

May 2, 1935

Assets

Current Assets:	
Cash	None
Total Cash Assets	None
Fixed Assets	None
Total Assets	None

Liabilities

Current Liabilities		None
Other Liabilities		None
Total Liabilities		None
Capital:		
Authorized Units of Beneficial Interest—1,000 from which net proceeds are to be received @ $100.00 each	$100,000.00	
Unissued Units of Beneficial Interest—1,000	100,000.00	
Outstanding Units of Beneficial Interest		None
Total Liabilities and Capital		None

NOTE.—Contingent Liability of a sum not to exceed $5,000.00 for attorneys fees and legal fees accruing to Trust, when, as and if executed. (See paragraph 33 of Trust Agreement.)

[fol. 118] Auditor's Certificate

I, Frederick W. Scholz, hereby certify as follows:

I am a certified public accountant of the State of New York, and practice the profession at 17 East 42nd Street, New York City, New York; I have no connection with J. Edward Jones Royalty Trust—Series "M" other than the usual relationship of an independent accountant to his client.

I have examined the records and files of J. Edward Jones Royalty Trust—Series "M" and have prepared therefrom the foregoing Balance Sheet, and I certify that, in my opinion, this Balance Sheet shows the correct financial position of J. Edward Jones Royalty Trust—Series "M" as of May 2, 1935, which is prior to the offering or sale of any interests to the public.

Subject to the foregoing comments, I have, after reasonable investigation, reasonable grounds to believe, and do believe, at the date of this certificate, that the statements contained in the attached Balance Sheet truly and fairly reflects the application of accepted accounting practices to

the facts disclosed by our investigation, and that there is no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

In accordance with the requirements of Section 7 of the Federal Securities Act, I hereby give my consent to the use of my name as having certified the part of the registration statement (or the papers or documents in connection with the registration statement) as herein above set forth.

Frederick W. Scholz, Certified Public Accountant, New York.

[fol. 119] J. Edward Jones Royalty Trust

Series "M"

New York City, New York

Profit and Loss Statement

May 2, 1935

Income	None
Expenses	None
Net Income	None

Auditor's Certificate

I, Frederick W. Scholz, hereby certify as follows:

I am a certified public accountant of the State of New York, and practice the profession at 17 East 42nd Street, New York City, New York; I have no connection with J. Edward Jones Royalty Trust—Series "M" other than the usual relationship of an independent accountant to his client.

I have examined the records and files of J. Edward Jones Royalty Trust—Series "M" and have prepared therefrom the foregoing Balance Sheet and Profit and Loss Statement, and I certify that, in my opinion, this Balance Sheet with supporting schedules and this Profit and Loss Statement show the correct financial position of J. Edward Jones Royalty Trust—Series "M" as of May 2, 1935, which is prior to the offering for sale of any interests to the public.

Subject to the foregoing comments, I have, after reasonable investigation, reasonable grounds to believe, and do believe, at the date of this certificate, that the statements contained in the attached Balance Sheet and in the attached [fol. 120] Profit and Loss Statement truly and fairly reflect the application of accepted accounting practice to the facts disclosed by my investigation, and that there is no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

In accordance with the requirements of Section 7 of the Federal Securities Act, I hereby give my consent to the use of my name as having certified the part of the registration (or the papers or documents in connection with the registration statement) as herein above set forth.

Frederick W. Scholz, Certified Public Accountant, New York.

[fol. 121] New York City, New York, May 2, 1935.

Suggested Form of Reconciliation and Tie Shown in Prospectus Dated May 4, 1935 With That in Registration Statement Form C-1

Prospectus page and number of paragraph	Registration statement item number
p. 1 Par 4	2, 9, Exhibit A
p. 2 " 1, 2, 3	4, 6, 7, 8, 9
p. 2 " 4	26, Exhibit A
p. 3 " 1	25, 32
p. 3 " 2	11
p. 3 " 3	15, 16, 29
p. 3 " 4	15, 16, 29
p. 4 " 1	20
p. 4 " 2	15, 20
p. 4 " 3	24
p. 4 " 4	25
p. 5 " 1	28
p. 5 " 2	29, 30, 31
p. 5 " 3	32
p. 5 " 4	33
p. 5 " 5	36
p. 5 " 6	39

Prospectus page and number of paragraph	Registration statement item number
p. 6 " 1	36, 39, 42, 45
p. 6 " 2	43, 44
p. 6 " 3	46
p. 6 " 4	58, 59, 60
p. 7 " 1	62
p. 7 " 2	60, Exhibit A
p. 7 " 3	76
p. 7 " 4	3
p. 7 " 5	21, 23, 24
p. 7 " 6	23, 24, 43
p. 8 " 2	42, 45
p. 8 " 3	35, 41
p. 8 " 4	61

[fol. 122] Prospectus

May 4, 1935

J. Edward Jones Royalty Trust Series "M"

American Charter Company, 800 Citizens Bank Bldg., Wilmington, Delaware, Trustee and Registrar

J. Edward Jones, 342 Madison Avenue, New York, N. Y., Depositor and Sponsor

Copies of the Registration Statement on file with the Securities and Exchange Commission, Washington, D. C., may be procured from the Commission upon payment of the legal charge therefor. Neither the fact that such Registration Statement has been filed with the Commission nor the issuance of this Prospectus under the rules and regulations prescribed shall be deemed a finding by the Commission that this Prospectus is true and accurate on its face or does not omit to state a material fact, or to mean that the Commission has in any way passed upon the merits of or given approval to such Prospectus or the security mentioned therein.

J. Edward Jones Royalty Trust Series "M" is limited to 1,000 fully participating authorized units offered in denominations of one unit, or more, at $100 per unit.

The right is reserved to reject any and all *pa*plications, in whole or in part, to sell or allot less than the amount applied for and to close the offering without notice.

[fol. 123] Under date of May 2, 1935, J. Edward Jones, 342 Madison Avenue, New York, N. Y., entered into a Trust Agreement with American Charter Company, 800 Citizens Bank Building, Wilmington, Delaware, by which Trust Agreement J. Edward Jones agreed to transfer, sell and convey to said American Charter Company, named as Trustee, oil producing royalties free, clear and unencumbered to the amount of $100,000 in declared value. J. Edward Jones, as Depositor and Sponsor of this issue, has the sole right to declare the values of the royalties so conveyed to the Trustee and the Trustee, under said Trust Agreement, is bound to accept the declared value placed thereon by J. Edward Jones. Upon the transfer of any portion of the $100,000 worth of oil royalties, as aforesaid, the Trustee is to issue to J. Edward Jones, or to his nominees, Participation Trust Certificates in units of $100, or multiples thereof, which Participation Trust Certificates entitle the holder thereof to participate in the net income, net receipts and net proceeds received by the Trustee from the sale of oil from the oil royalties which the number of units expressed in the Certificate bears to the whole number of units then issued and outstanding.

In the event that J. Edward Jones does not convey oil royalties to the full aggregate amount of $100,000 at the declared value within the date of one year from May 2, 1935, the trust will be closed and no more property will be conveyed to the Trustee against which Certificates may be issued. The units have a declared value of $100 per unit and the aggregate amount of units in value cannot exceed [fol. 124] the value of the oil properties conveyed to the Trustee at the declared value thereof.

The proposed date of the initial public offering of the Certificates is May 24, 1935. The Participation Trust Certificates are of the distributive, not cumulative, type and the holder of a Certificate is entitled only to the pro rata distributive share in the hands of the Trustee, subject to the right of the Trustee to pay from the income, taxes, expenses, recording fees and other incidental expenses, and subject to the right of the Trustee to reserve the sum of $2,000 out of ½ of 1% of the income.

The reserve thus created is to be used first for the payment of any fee, charge and cost, including attorney's fees, that may be incurred therein.

The income of the trust will be charged for the expense of the drawing of the Trust Agreement, the preparation of the Registration Statement and Prospectus and the filing thereof and such work as may be necessary in complying with the rules and regulations of the Securities and Exchange Commission so that the Registration Statement may become effective. This amount is limited by the Trust Agreement to the sum of $5,000.

The entire properties constitute the one unit and the corpus of the estate held by the Trustee for the benefit of holders of the Certificates is not to be divided in separate units of property. No properties have been conveyed to the Trustee; but the property which is to compose the trust is to be purchased by J. Edward Jones, 342 Madison Avenue, New York, N. Y., who is also named as the Depositor and Sponsor.

Property once acquired by the Trustee by the convey- [fol. 125] ance thereof to him from J. Edward Jones cannot be eliminated from the trust; but under the provisions of the Trust Agreement the Trustee may sell or dispose of all or a portion of the properties of the trust with the consent in writing of holders of two-thirds in amount of the aggregate of the Certificates issued and outstanding at the time of consent. The trust must be liquidated by the Trustee immediately after the expiration of twenty-one years from the date of its formation, May 2, 1935, and may be terminated sooner by liquidation upon the consent in writing of the holders of two-thirds of the aggregate amount of Certificates then issued and outstanding. The Trustee has no authority to purchase other properties with the proceeds of any property sold; but the proceeds will be distributed to Certificate holders prorata.

Notwithstanding the consent of the holders of two-thirds of the aggregate of the Certificates issued and outstanding either to the liquidation prior to the twenty-one year period or to the sale of all or any part of the property, the Trustee is not required to make such sale or such liquidation, though he may do so upon receiving such consent.

No other properties can be substituted for the property conveyed to the Trustee; there are no dividends, rights or split-ups accruing to the Certificate holders and the Cer-

tificate holders have no right to exercise a vote in respect to the securities held in the trust, except the right of the consent in writing of the holders of two-thirds in the aggregate, as above set forth.

No other person, except J. Edward Jones, has the right to select properties to be conveyed to the Trustee. There [fol. 126] are no Certificate holders of this trust and no distributions have been made. The dates of distribution of distributive moneys have not been fixed, but it is the purpose and plan to make distributions monthly where the net proceeds available for distribution warrant it.

The income of the trust is received monthly in the form of checks from and of the Oil Purchasing Companies purchasing the oil from the royalty interest comprising the trust estate. No interest will accrue on those moneys so deposited and no person has the use of any undistributed income or moneys of the trust.

The Trustee, in addition to the counsel fees not to exceed $5,000, is granted a lien upon the trust properties for all its fees and charges, which include the cost of recording all documents, $1.00 for each document, and is entitled to a lien on the trust property, or its income, of 25¢ per annum for each account upon its books, for 5% of the receipts or income for its services in the payment of distribution of the income and for incidental expenses, including postage, books of account, checks, stationery and supplies. All Municipal, State and Federal taxes, fees and charges, as well as the Trustee's expenses and supervision expenses are a lien upon the property. No other lien may be created against the trust property.

No provision is made for the termination of the interest of the holder of the Trust Certificates; but he may sell and assign his Certificate to another and the assignee may procure a new Certificate in lieu thereof.

The trust cannot be extended as an entirety beyond twenty-one years from May 2, 1935. At the expiration of [fol. 127] the twenty-one years from May 2, 1935, unless the trust has been terminated sooner by the consent in writing of the holders of two-thirds in amount of the aggregate of the Certificates then issued and outstanding, the Trustee then in office shall liquidate the same and distribute the moneys or the properties, after paying all claims, expenses and liquidation charges. No fixed

amount for liquidation charges is provided; but the Trustee will be entitled to reasonable fees for its services.

The proceeds of any sale of the trust property is first applied to the payment of taxes, charges, fees, costs, disbursements and expenses incurred by the Trustee, including attorney's fees, and the balance divided prorata among the holders of Participation Trust Certificates.

No method is provided for giving notice to the holders of Certificates of the termination of the trust at the end of the twenty-one year period, or upon termination sooner by consent in writing of the holders of two-thirds of the Certificates then issued and outstanding.

The price of the Certificates is calculated on the declared value of the property conveyed to the Trustee, the stated aggregate value of the Certificates at $100 per unit equalling the declared value of the property conveyed to the Trustee.

J. Edward Jones will be entitled to any difference between the price at which the properties are purchased by him and the price of the declared value to the Trustee at the time of the conveyance of the properties to the Trustee.

Upon the conveyance of the properties to the Trustee J. Edward Jones will be entitled to receive Certificates in an [fol. 128] aggregate amount equalling the declared value of the property so conveyed and will be entitled to retain the proceeds of the sale of Certificates made by him or through him. All expenses of the sale of Certificates, commissions or otherwise, is to be paid by J. Edward Jones and no charge can be charged against the Trustee or the trust property or against the income of the trust property for the sale or marketing of the Participation Trust Certificates. The Trustee will not pay any commissions for the purchase of any properties conveyed to it which constitute the corpus of this trust.

Holders of Participation Trust Certificates will receive a report each time a periodic distribution is made and an annual audit will be made and a concise report thereof forwarded to the Certificate holders annually. This audit and report will cover all receipts, expenses, reserves and disbursements. Frederick W. Scholz, 15 East 42nd St., New York, N. Y., is the person named to make the annual audit.

Certificates are to be sold at the uniform price of $100. per unit and there will be no variation in price at which the Certificates are offered to the public. Certificate holders

have no re-investment rights and the purchase price will be payable in cash and not in installments.

No provision is provided for the removal of the Trustee; but he may resign at any time. Upon his resignation the five holders of Participation Trust Certificates largest in amount select a temporary Trustee. The temporary Trustee upon his selection notifies the holders of Participation Trust Certificates and suggests the name of a successor Trustee. Unless objection is made within ten days by hold-
[fol. 129] ers of a majority in amount of the Certificates then outstanding the person so suggested and selected by the temporary Trustee becomes successor Trustee.

The Trustee being a corporate entity its duties may be performed by the officers of the corporate Trustee, but no duties other than clerical and ministerial are to be performed by any person other than the Trustee.

The Trustee is not answerable for the default or misconduct of any agent or attorney appointed by it, if such agent or attorney shall have been selected with reasonable care, and is answerable only for its own wilful misconduct or gross negligence. The Trustee is not to be held responsible for either the value or title of property conveyed to it or for the validity of any deed or instrument making such conveyance.

The Depositor cannot assign his obligations to make the conveyance of properties hereunder, or any other obligations enjoined upon him by the Trust Agreement; but he may sell or assign any Trust Certificates received by him, and both the Trustee and Depositor (Sponsor) may own and hold Participation Trust Certificates herein.

The validity of the Trust Agreement and of the Certificate to be issued thereunder, has been passed upon by E. J. Lundy, Attorney, 1308 Hunt Building, Tulsa, Oklahoma, Floyd Toomey, % Alvord & Alvord, Munsey Building, Washington, D. C., is named as the person authorized to receive service and notice of all notices and orders which may be issued by the Securities & Exchange Commission relative to the Registration Statement.

[fol. 130] No regular stated or uniform dividend or distribution is promised; but each holder of a Participation Trust Certificate is to receive his or her proportionate share of the net income, net receipts and net proceeds arising from the purchase price of oil from royalties constituting the trust estate.

J. Edward Jones Royalty Trust Series "M" is merely the name of the trust and is neither a corporation nor an express or common law trust.

No certificates can be issued by the Trustee until properties have been conveyed to the Trustee, as provided in the Trust Agreement, and units cannot be issued in excess of the amount of the declared value of properties conveyed to the Trustee.

At the date of this Prospectus, May 4, 1935, no properties have been conveyed by J. Edward Jones to the Trustee and, therefore, no certificates are issued and outstanding. The Trustee and J. Edward Jones Royalty Trust Series "M" having no property or assets forming the corpus or estate of the trust at the date of this Prospectus and having performed no business, has no Profit and Loss Statement and no Balance Sheet, except a negative one, showing no property, no income, no assets and no liabilities. When property is conveyed to the Trustee, against which the Participation Trust Certificates may be issued, the cost of preparing the Trust Agreement, the Registration Statement and performing the services relative to filing the same will be charged against the property of the trust.

The American Charter Company, the Trustee, is a corporation having perpetual existence; is organized under the [fol. 131] laws of the State of Delaware and is doing business therein.

Signature of the Issuer

A. If a corporation:

.....

[Seal.] By .....
(Title)

By .....
(Title)

Attest:

.....
(Title)

.....
Principal Executive Officer

.....
Principal Financial Officer

.....
Principal Accounting Officer

A Majority of the Board of Directors.

. . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

[fol. 132] B. If a partnership. (All members thereof should sign):

. . . . . .

. . . . . .

. . . . . .

J. Edward Jones Royalty Trust Series "M", by —— ——, Issuer.

———

[fol. 133] Exhibit B Annexed to Petition for Review

Western Union

M167 174 1 Extra DL Govt 1/144 = 1 M I Washington DC 23 535 P =

J Edward Jones, care Floyd Toomey =
Care Alvord and Alvord Munsey Building Wash DC=

Notice is hereby given that upon examination of the Registration Statement of J Edward Jones filed May four nineteen hundred thirty five file two dash one four naught eight It appears to the Securities and Exchange Commission that such statement includes untrue statements of material facts and omits to state material facts required to be stated therein and material facts necessary to make the statements therein not misleading in items thirteen comma twenty one comma twenty two comma twenty three comma twenty four comma thirty six comma thirty nine comma forty comma forty five comma forty eight comma fifty one comma fifty three comma sixty one comma seventy one comma Exhibits E comma H comma Q comma and the prospectus stop Hearing in this matter will be held at the office of the Commission in Washington DC at ten AM Thursday June six nineteen hundred thirty five at which time and place registrant [fol. 134] may appear and show cause why a stop order

should not be issued suspending the effectiveness of such registration statement =

Francis P Brassor Secretary Securities and Exchange Commission.

EXHIBIT C ANNEXED TO PETITION FOR REVIEW

Subpoena Duces Tecum

United States of America

Securities and Exchange Commission

To J. Edward Jones, 342 Madison Avenue, New York, New York:

You are hereby required to appear before William Green, an officer of the Securities and Exchange Commission, at Room 1102, 1778 Pennsylvania Avenue, N. W. in the City of Washington, D. C. on the 18th day of June, 1935, at 10 o'clock a. m. of that day, to testify in the Matter of J. Edward Jones, File No. 2-1408.

And you are hereby required to bring with you and produce at said time and place the following books, papers and documents:

General ledger, subsidiary ledgers, journal, cash book, books of account and financial statements of J. Edward Jones; general ledger, journal, cash book and books of account of J. Edward Jones relating to J. Edward Jones Royalty Trust, Series "M"; all contracts, agreements and correspondence of J. Edward Jones relating to the distribution of Participation Trust Certificates in J. Edward [fol. 135] Jones Royalty Trust, Series "M"; all correspondence and communications of J. Edward Jones with any State authority relating to the distribution of Participation Trust Certificates in J. Edward Jones Royalty Trust, Series "M".

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or

an officer designated by it, has hereunto set his hand at Washington, D. C. this 13th day of June, 1935.

Geo. C. Mathews, Commissioner.

Notice to Witness.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

EXHIBIT D ANNEXED TO PETITION FOR REVIEW

For Immediate Release, Friday, September 22, 1933

Federal Trade Commission, Washington

Securities Act of 1933

Release No. 47

The Federal Trade Commission announces adoption of a rule under the Securities Act conferring certain powers upon the person who is designated in each registration statement as authorized to receive all communications from the [fol. 136] Commission concerning the security issue filed for registration.

According to the new ruling, such person shall have power to amend the registration statement by altering to a subsequent date the date of the proposed offering of the securities registered; power to withdraw the registration statement or amendments thereto; and power to consent to entry of an order by the Commission prior to effective date of the registration refusing to permit the registration statement to become effective until it has been amended in accordance with the order.

A consent order entered by the Commission under this ruling is to be "Without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate * * *".

Accompanying the rule is an explanatory note covering the arbitrary delaying of the proposed date of offering of a security in instances where the registration statement is incomplete or inaccurate but "can be corrected with ease by an amendment". The purpose is to permit of a method whereby an extension of 20 days can be afforded a regis-

trant so as to allow him, without threat of stop order proceedings, time to make and file the necessary amendments. The procedure is designed with the idea of permitting the Commission not to make a record against a registrant who, the Commission has reason to believe, is ready to conform to the act. Under this procedure the Commission can afford him sufficient time to make his registration statement conform to the act, at the same time preventing him from selling securities until the necessary amendments shall have been made.

[fol. 137] Other rules adopted by the Commission pertain to (1) the withdrawal of a registration statement or an amendment thereto, (2) amendments filed pursuant to an order of the Commission, (3) a definition of "distribution" as used in Section 2 (11) of the act, and (4) the incorporation by reference of exhibits filed with previous registration statements. The purpose of the last named rule is merely to facilitate the second and subsequent registrations, and to avoid a filing of unnecessary exhibits with such registrations.

Full text of the new rules is as follows:

Amendments Filed Pursuant to an Order of the Commission

An amendment made prior to the effective date of the registration statement shall be deemed to have been made pursuant to an order of the Commission within the meaning of Section 8 (a) of the Securities Act so as to be treated as part of the registration statement only when the Commission shall after the filing of such amendment find that it has been filed pursuant to its order.

Withdrawal of Registration Statement or Amendment Thereto

Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following man-

[fol. 138] ner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

Conferring of Powers of Amendment, Withdrawal and Entry of Consent Order

(1) All registrants shall hereafter confer upon the person designated in the registration statement as the person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration statement,

(a) a power to amend the registration statement by altering to a subsequent date of the proposed offering of the securities for which the registration statement is filed; and

(b) a power to withdraw the registration statement or all amendments thereto, or an amendment made by virtue of the power conferred in paragraph (a) above; and

(c) a power to consent to the entry of an order issued under Section 8(b) of the Securities Act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

[fol. 139] (2) The naming of a person in accordance with the forms promulgated by the Commission as a person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration statement, shall be deemed also, unless there is an express statement to the contrary, as an authorization by the registrant of the person so named as having the powers specified in paragraph (1) of this rule.

Explanatory Note: The Commission upon finding that a registration statement is on its face incomplete or inaccurate or includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, but also finding that such incompleteness, inaccuracy, un-

truth or omission can be corrected with ease by an amendment, and recognizing that the case is not one that requires immediate steps to be taken to issue an order under Section 8(b) or 8(d) of the Securities Act, but recognizing that it is desirous that no securities for which such registration statement is filed should be legally sold until the necessary amendments shall have been made, may thereupon request the person referred to in the above rule to file an amendment prior to the effective date of the registration statement delaying the proposed date of the offering of the securities for which the registration statement is filed. Such amendment, which may under the above rule be filed by the person named in the above rule, if filed prior to the effective date of the registration statement, will under Section 8(a) [fol. 140] of the Securities Act automatically delay the effective date of the registration statement for twenty days after the filing of such amendment, until and unless some further action is taken by the Commission. The other necessary amendments properly executed may thereafter be forthcoming. Upon their filing the Commission can consent to such filing, with due regard to the public interest and the protection of investors, thereby making such amendments part of the registration statement. Such a procedure does not necessitate delaying the original effective date of the registration statement, if the amendments are duly executed and filed prior to such date. At most, it necessitates a delay in the date of offering the security for one day, and even this day may be eliminated by requesting the withdrawal of the amendment first filed. This procedure permits delaying the coming of an effective date when the registration statement unless amended is inaccurate or incomplete. At the same time it affords a registrant the opportunity to amend without having initiated against him proceedings looking forward to the issuance of an order under Section 8(b) or 8(d). Lack of cooperation on the part of a registrant by failing promptly to make the necessary amendment will require the Commission to initiate proceedings looking forward to the issuance of an order under Section 8(b) or 8(d).

A registrant may seek to avoid the making of such an amendment or the initiation of proceedings looking forward to the issuance of an order under Section 8(b) or 8(d) by requesting that his registration statement be withdrawn

or by requesting that an order of the type specified in paragraph 1(c) of the rule above be entered.

[fol. 141] Incorporation by Reference of Exhibits Filed With Previous Registration Statements

The issuer of a security for which a registration statement is in effect may, in filing a subsequent registration statement, incorporate by specific reference such exhibits or parts thereof, which may have been filed with any of its previous registration statements, as it may choose. If the inclusion of additional items would be necessary to make such a reference complete, the issuer will be deemed to have complied with the requirement if, along with the reference, it also files such additional items. If alterations have taken place in any document, a copy of which was filed as an exhibit with a previous registration statement, the copy so filed may be incorporated by reference, if the issuer files along with the reference a statement indicating all deletions, and containing the text of all substitutions and additions, and stating the date or dates on which such changes took effect. The Commission, however, may refuse to recognize any incorporation by reference in any case where in the opinion of the Commission such incorporation by reference is unclear or confusing.

Distribution Under Section 2 (11) Defined to Include Certain Activities

A person, the chief part of the business of which consists in the purchase of the securities of any one issuer, its subsidiary and/or affiliate and in the sale of its own securities to furnish the proceeds with which to acquire the securities of such issuer, subsidiary and/or affiliate, is to be regarded as engaged in the distribution of the securities of such issuer, subsidiary and/or affiliate within the meaning of Section 2 (11).

[fol. 142] EXHIBIT E ANNEXED TO PETITION FOR REVIEW

Subpœna

United States of America

Securities and Exchange Commission

To J. Edward Jones, 342 Madison Avenue, New York, N. Y.:

You are hereby required to appear before William Green, an Officer of the Securities and Exchange Commission, at Room 1102, Securities & Exchange Commission, 1778 Pennsylvania Avenue, in the City of Washington, D. C., on the 27th day of June, 1935, at ten o'clock a. m. of that day, to testify in the Matter of the hearing on the Registration Statement of J. Edward Jones.

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Washington, D. C., this 18th day of June, 1935.

William Green, an Officer of the Securities & Exchange Commission.

Notice to Witness.—If claim is made for witness fee or mileage, this subpœna should accompany voucher.

[fol. 143] EXHIBIT F ANNEXED TO PETITION FOR REVIEW

BEFORE SECURITIES AND EXCHANGE COMMISSION

In the Matter of Registration Statement of J. EDWARD JONES

File No. 2-1408

Dismissal

Comes now J. Edward Jones in his own proper person and appearing specially and for the purpose of this Dismissal only and hereby dismisses his registration statement

heretofore filed with this Honorable Commission under the above indicated number and withdraws all application for consideration thereof or action thereon.

Dated at New York, N. Y., this 26th day of June, 1935.

J. Edward Jones.

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

J. Edward Jones of lawful age, being duly sworn upon oath states that he is the above named J. Edward Jones and [fol. 144] that he executed the above dismissal for the uses and purposes therein set forth.

J. Edward Jones.

Subscribed and sworn to this 26th day of June, 1935.
Walter Laier, Notary Public. (Seal.)

EXHIBIT G ANNEXED TO PETITION FOR REVIEW

BEFORE SECURITIES AND EXCHANGE COMMISSION

In the Matter of Registration Statement of J. EDWARD JONES

File No. 2-1408

Motion to Dismiss

Comes now J. Edward Jones by Harry O. Glasser of Enid, Oklahoma, J. N. Saye of Longview, Texas and H. I. Fischbach of New York, N. Y., his counsel, appearing specially and for the purposes of this motion only and respectfully moves this Honorable Commission conformable with the application of the said J. Edward Jones heretofore made on June 18, 1935, that the Commission enter its order permitting the said J. Edward Jones to withdraw "Regis- [fol. 145] tration Statement J. Edward Jones Royalty Trust Series 'M' " numbered 2-1408 before said Commission and to thereupon enter an order of dismissal of such registration statement and application for the reason that said J. Edward Jones having voluntarily filed said registration

statement as privileged by law so to do, and having subsequently concluded that the same should be withdrawn before final action thereon, the said J. Edward Jones is likewise entitled, as a matter of law, to such privilege of withdrawal without other or further action thereon by the Commission upon the sole condition of payment of costs.

Wherefore the said J. Edward Jones respectfully prays that the order of this Commission be entered permitting the said J. Edward Jones to withdraw said registration statement hereinbefore more specifically identified, and that the further order of this Commission be entered dismissing at the cost of the said J. Edward Jones, said registration proceeding and all matters pertaining thereto, and for such other relief as may be proper in the premises.

J. Edward Jones, by Harry O. Glasser, J. N. Saye, H. I. Fischbach, Counsel.

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

J. Edward Jones, of lawful age, being first duly sworn [fol. 146] upon oath states that he is the J. Edward Jones above named, has read the foregoing Motion, has authorized the filing and prosecution of the same, has personal knowledge of the matters therein set forth and the same are true as alleged to the best of the knowledge, information and belief of this affiant.

J. Edward Jones.

Subscribed and sworn to this 26th day of June, 1935.
Walter Laier, Notary Public. (Seal.)

EXHIBIT H ANNEXED TO PETITION FOR REVIEW

BEFORE SECURITIES AND EXCHANGE COMMISSION

In the Matter of Registration Statement of J. EDWARD JONES

File No. 2-1408

Motion to Quash

Comes now J. Edward Jones by Harry O. Glasser of Enid, Oklahoma, J. N. Saye of Longview, Texas and H. I.

Fischbach of New York, New York, his counsel, appearing specially and for the purposes of this motion only, and respectfully moves this Honorable Commission that it enter [fol. 147] its order quashing a purported subpoena for the above named J. Edward Jones, issued on the 18th day of June, 1935, directing and requiring the attendance of the said J. Edward Jones before said Commission on Thursday June 27, 1935, at the hour of 10:00 o'clock A. M., for the reasons,

(a) That the Commission does not have any proceeding pending in which such subpoena may legally be issued;

(b) That any rule or subdivision of any rule of said Commission which undertakes to retain jurisdiction in the Commission over any registration statement voluntarily filed with the Commission and subsequently withdrawn by the Registrant before final action thereon, is void in that such proposed retention of jurisdiction purports to be an exercise of legislative power not delegated by Congress, and if delegated in violation of the Federal Constitution.

Wherefore the said J. Edward Jones respectfully prays that the order of this Commission be entered quashing said purported subpoena, and releasing and exonerating the said J. Edward Jones from obligation thereunder and for all other and proper relief in the premises.

J. Edward Jones, by Harry O. Glasser, J. N. Saye, H. I. Fischbach, Counsel.

[fol. 148] UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

J. Edward Jones, of lawful age, being first duly sworn upon oath states that he is the above named J. Edward Jones, has read the foregoing motion, has authorized the filing and prosecution of the same, has personal knowledge of the matters therein alleged and set forth and that the same are true as alleged to the best of the knowledge, information and belief of this affiant.

J. Edward Jones.

Subscribed and sworn to this 26th day of June, 1935.
Walter Laier, Notary Public. (Seal.)

EXHIBIT I ANNEXED TO PETITION FOR REVIEW

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of Registration Statement of J. EDWARD JONES

File No. 2-1408

Objection to Jurisdiction

Comes now J. Edward Jones by Harry O. Glasser of [fol. 149] Enid, Oklahoma, J. N. Saye, of Longview, Texas and H. I. Fischbach of New York, New York, his counsel, appearing specially and for the purpose of this objection only, and objects to the jurisdiction of the Securities and Exchange Commission to take any or further proceedings in the above entitled matter for the following reasons:

(a) that the so called Securities Act of 1933 as amended by Title II of Securities Exchange Act of 1934, known as Securities Exchange Act of 1934 is unconstitutional and is violative of and repugnant to the provisions of Amendments IV, V, IX, X and XIV to the Constitution of the United States,

(b) that the Securities Exchange Act is void as an attempted delegation of legislative power to the Commission, and as such plainly in violation of the IV and V and IX Amendments to the Constitution of the United States.

(c) that the Commission in the interpretation of its powers has sought to legislate in the matter of rules promulgated by the Commission to have the effect of Acts of Congress, which could not be so without first having been introduced as a bill in one of the Houses of Congress, then having passed both houses, be finally approved by the President of the United States or re-enacted over his veto,

(d) that national emergency, brought about by financial depression did not bestow upon Congress the power to enact the Securities Exchange Act or Amendments thereto,

(e) that J. Edward Jones and all others similarly situ- [fol. 150] ated and engaged in New York or elsewhere, in the sale of units of ownership in oil and/or gas royalties and/or "working interest" production in Oklahoma or elsewhere is not engaged in an activity that affects interstate

commerce, except incidentally and remotely, and such business therefore is not subject to regulation by the Federal Government,

(f) that the Securities Exchange Act is and amendments thereto are void because the same are an attempt by the National Government to usurp powers reserved to the respective States and the people thereof, by the Tenth Amendment to the Constitution of the United States,

(g) that the business of J. Edward Jones and others similarly situated in the sale in New York of units of ownership in oil production in Oklahoma, which may or may not find its way out of the State of Oklahoma, is an intra state business, wholly within the regulatory control of the State of New York, and the Federal Government is therefore without authority under the Commerce Clause of the Federal Constitution to control the transportation of such harmless commodities as may incidentally or remotely find their way into interstate or foreign commerce.

Wherefore the said J. Edward Jones respectfully prays that this objection to jurisdiction be sustained in its entirety and that the said J. Edward Jones and all others similarly situated may be relieved of the burdens of the Securities [fol. 151] Exchange Act of 1933, and all amendments thereto, and for all other relief that may be proper and just in the premises.

J. Edward Jones, by Harry O. Glasser, J. N. Saye, H. I. Fischbach, Counsel.

United States of America,
State of New York,
County of New York, ss:

J. Edward Jones, of lawful age, being first duly sworn upon oath states that he is the above named J. Edward Jones, that he has read the foregoing objection to jurisdiction, has authorized the filing and prosecution of the same, has personal knowledge of the matters therein set forth and that the same are true as alleged to the best of the knowledge, information and belief of this affiant.

J. Edward Jones.

Subscribed and sworn to this 26th day of June, 1935.
Walter Laier, Notary Public. (Seal.)

[fol. 152] IN UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

No. M17/191

SECURITIES AND EXCHANGE COMMISSION, Applicant,

v.

J. EDWARD JONES, Respondent

ORDER APPEALED FROM

An application having been made by the Securities and Exchange Commission for an order compelling J. Edward Jones to appear and testify pursuant to a subpœna duly served upon him, and having duly come on to be heard at a stated term of this court held July 23, 1935, and the said J. Edward Jones having appeared and answered; now, upon the application of the Securities and Exchange Commission filed herein July 3, 1935, duly verified by John J. Burns, Esq., General Counsel, July 2, 1935, the order to show cause signed by the Honorable Henry W. Goddard, one of the Judges of the United States District Court for the Southern District of New York, dated July 3, 1935, and the proof of service thereof, and the answer of the respondent J. Edward Jones, duly verified July 6, 1935, and the exhibits annexed thereto, and after hearing John J. Burns, General Counsel of the Securities and Exchange Commission, in support of said application, and H. I. Fishbach, [fol. 153] Esq., Harry O. Glasser, Esq., and J. N. Saye, Esq., in opposition thereto, and due deliberation having been had,

On motion of John J. Burns, Esq., solicitor for the applicant, it is hereby

Ordered that the respondent, J. Edward Jones, appear before the Securities and Exchange Commission, or one of its examiners designated by it, September 9, 1935, at 10:30 in the forenoon of that day, at the offices of the Securities and Exchange Commission, Room 1103, at 1778 Pennsylvania Avenue, Washington, District of Columbia, there to testify in the matter of the registration statement of J. Edward Jones, and to give answer to any and all pertinent questions regarding the information and documents hereto-

fore filed by the respondent with the Commission upon the said registration statement.

Dated New York, N. Y., August 23, 1935.

Francis G. Caffey, United States District Judge.

[fol. 154] In United States District Court, Southern District of New York

M 17/191

Securities and Exchange Commission, Applicant,

against

J. Edwin Jones, Respondent.

John J. Burns, Esq., Attorney for Applicant; Francis Currie, Esq., and Francis S. Walker, Esq., of counsel.

H. I. Fischbach, Esq., Attorney for Respondent; Harry O. Glasser, Esq., and J. N. Saye, Esq., of counsel.

Opinion of the Court

The condition of the calendars in this district and the pressure of other business demanding attention prevent thorough discussion. Unavoidably comments must be hurried and in rather discursive form.

Two problems are presented. One relates to interpretation; the other to validity. I shall take up the interpretation phase first.

The petition is in conformity with the substantive provisions of the statute. Its sufficiency is not to be measured by the requirements of formal court pleadings. I see no merit in the motion to strike out parts.

The registration statement was filed May 4, 1935. More [fol. 155] than twenty days elapsed prior to counsel for the respondent interposing the procedural objections on which they now rely. No stop order has been issued by the Commission. In consequence, by force of Section 8 of the Securities Act the statement became and continues to be effective (unless terminated by the respondent's own acts, hereafter mentioned).

By the same token, if the registration statement be still effective, Section 8 empowered the Commission to take

testimony concerning it and the Commission, therefore, is entitled to have the respondent attend as a witness before it. The subpœna for the respondent was duly served. He refused to appear. It follows, under Section 22 (b), that this court may entertain the present application and is authorized to direct him to appear before the Commission (unless, indeed, this court's jurisdiction has been ousted by the review proceedings pending in a higher court).

Pursuant to Section 9 (a), the respondent has asked the Circuit Court of Appeals for the Second Circuit for a review of the Commission's order, in substance holding (as he says) that the registration statement remains alive before it. He urges that, on this account, the authority of this court under Section 22 (b) is suspended.

The respondent's contention would seem sound if only the ordinary rules of law relating to court proceedings governed and if Congress has not otherwise provided. The Circuit Court of Appeals itself plainly has authority to stay further proceedings by the Commission until after it disposes of the review proceedings; but, so far as appears,—and, as I understand, counsel agree it is the fact,—to date that court has not issued a stay nor has one even [fol. 156] been requested. In these circumstances, by force of Section 9 (b), the institution of the review proceedings in the appellate court does not operate as a stay of the Commission's order. Inasmuch as the Commission is free to go forward, it follows equally that there is no obstacle to this court's exercising the jurisdiction, vested in it by Section 22 (b), to require the witness to submit to examination by the Commission.

Section 5 unambiguously prohibits carriage of securities through the mails or in interstate commerce unless a registration statement as to such securities be in effect at the time (see also Section 17). There are numerous other provisions in the statute relating to registration statements (See, for example, Sections 6, 7, 9, 10 and 11; also Schedule A). It is not necessary, however, to set these out or even to deal with them in the instant case. This is so because, obviously, they are merely incidents to or provide mere mechanics for the administration of the Commission's functions arising out of Section 5. If Section 5 stands, they will stand also.

So also, as it seems to me, it is equally manifest that the participation trust certificates in producing oil royalties, covered by the respondent's registration statement (Form C-1), are securities within the definition of that term embodied in Section 2 of the Act,—precisely in the same way and to the same extent as are bonds and certificates of stock (Cf. New York, ex rel. Hatch v. Reardon, 204 U. S. 152). I think there is nothing at variance with this view in Hemphill v. Orloff, 277 U. S. 537, or in Champlin Rfg. Co. v. Commission, 286 U. S. 210, or in any other case cited by the respondent.

[fol. 157] This brings us to the issues raised as to validity.

As a preliminary, several things are to be borne in mind: (1) We are not concerned with the Securities Exchange Act of 1934,—save in a minor single aspect, which will be pointed out. (2) Disposition of the Commission's application to this court turns only upon the Securities Act of 1933; so that, with respect to constitutionality, that statute alone is now involved. (3) The court should confine its consideration to such portions of the statute as are essential to determination of the litigation now before it. (4) In so far as the language of the statute permits, it should be construed so as to bring the enactment within the powers of Congress and thus to avoid an adjudication of unconstitutionality. (5) Every doubt must be resolved in favor of constitutionality. (6) Section 26 provides that, even though some portions of the Act be held invalid, the remainder shall not be affected; and it is settled that such a declaration by Congress creates a presumption that the invalidity of any separable provision leaves the remaining provisions unaffected (Champlin Rfg. Co. v. Commission, 286 U. S. 210, 234-5).

Consistently with the six propositions just recited, for the purpose of passing on the principal assault made on the Securities Act of 1933, I see no occasion to determine more than whether Congress has power to provide for exclusion from the mails, or from interstate transportation, of physical securities when no registration statement concerning them is in effect. If I be right in this analysis of the situation, then it seems to me clear that so much of the statute as deals with the particular subject, embodied in [fol. 158] Section 5 and related sections, is valid.

In a long line of cases,—certainly from as early as Ex parte Jackson, 96 U. S. 727,—the Supreme Court has sustained many regulations of the mails more drastic than those contained in the Securities Act. It strikes me that Public Clearing House v. Coyne, 194 U. S. 497, amply supports the portion of Section 5 to which I have referred (See also U. S. ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407).

The facts within general knowledge are entirely adequate to warrant the Congress in concluding (1) that exclusion from the mails of securities involving schemes to defraud is in the public interest; (2) that this object could only be accomplished by advance consideration; (3) that an appropriate means for examining into the fitness of securities for admission to mail privileges was the creation of an expert Government agency to conduct needed investigations; (4) that among the pertinent equipment for efficient operation of such an agency are registration statements, to be supplied by applicants for mail privileges, and subpoena power in the agency for use in getting evidence to enable it to reach proper decisions with respect to the statements (Constitution, Article I, Section 8, Clause 18; Legal Tender Cases, 12 Wall. 457, 533-4).

In like way, to the extent we are concerned at present, I think Congress had power to provide in Section 5, as it did, regulations for the transportation of securities in interstate commerce (McDermott v. Wisconsin, 228 U. S. 115, 128).

In Hammer v. Dagenhart, 247 U. S. 251, the goods dealt with were harmless. For that reason the case is disting- [fol. 159] uishable. The statute here, however, denies the facilities of interstate commerce only to articles which, after hearing, are duly ascertained to be fraudulent or, if not actually fraudulent, unfair to investors. They are harmful. Moreover, their nature, under conditions prevailing today, is such that no person distant from their place of origin ordinarily can find out for himself whether they are or are not worthless or vicious in character. The statute under consideration makes no attempt to interfere with their sale or other handling within the single State of their initiation. On the other hand, where offered to prospective purchasers far from there, I think there is no more ground for exempting them from regulation of their transportation

interstate, until such transportation is licensed by a Government agency, than there would be for letting foods and drugs circulate freely between the States without labels or without outlawing those which would injure the users.

Admittedly the line of demarcation between what Congress may and what it may not prohibit with regard to interstate commerce is difficult to state with accuracy. From the foundation of the Government the Supreme Court has struggled with the task. Nevertheless, on the decisions of our highest court,—which are assembled and discussed with discrimination in Brooks v. United States, 267 U. S. 432,—I feel no hesitancy in classing the Securities Act of 1933,—in so far at least as I must pass on it in the present case,—as well within the power of Congress to enact.

If Congress possess the power I have attributed to it, then it cannot be gainsaid that it may establish a Government agency, such as the Commission, as an appropriate [fol. 160] means for discovering and announcing what securities meet the standards prescribed.

The respondent next insists that the proceedings before the Commission with respect to the registration statement he filed with that body ended prior to commencement of the proceedings before this court to compel him to appear before the Commission. This contention is the second chief ground on which he resists the issuance of a subpoena under the order of this court.

In brief the position of the respondent is that the proceedings before the Commission lapsed by his telling it that he withdrew his statement, as well as by his motions (overruled by the Commission's examiner) to dismiss the proceedings and to quash the subpœna for him issued by the examiner. As both sides have conceded, this aspect of their dispute turns on the question of whether a particular rule of the Commission is valid.

In substance, the rule is that no registration statement may be withdrawn without the consent of the Commission. More specifically put, the rule says that any registration statement "may be withdrawn upon the request of the registrant if the Commission consents thereto" and that the Commission's consent "shall be given * * * with due regard to the public interest and the protection of investors."

As I construe the document referred to, it means no more than is now, and from remote times has been, embodied in court rules with respect to the discontinuance of law suits. A typical illustration of such a court rule is Equity Rule 2 of this court. In effect, that provides that a discontin-
[fol. 161] uance will be permitted only upon such terms as the court deems justice to require, including (if the court see fit) bar of a second suit on the same cause of action. Equity Rule 2 is valid (Young v. So. Pac. Co., 25 Fed. (2d) 630; In re J. R. Palmenberg Sons, 76 Fed. (2) 935.) That being true, I see no reason why a like rule by the Commission should not be valid.

I find nothing contra in Barrett v. Virginia Railway Co., 250 U. S. 473, or in Ex parte Skinner & Eddy Corp., 265 U. S. 87. The supposed analogy in court procedure, on which the respondent relies, seems to me, therefore, to fail or at least not to help him. If a court may refuse a discontinuance, except on terms, when justice so requires, I see no warrant for holding unjustified a rule by the Commission that it will retain and take testimony as to a registration statement voluntarily lodged with it until it is sufficiently informed to prescribe and has prescribed the terms which it deems demanded by "the public interest and the protection of investors" as a condition precedent to the registrant removing himself from its jurisdiction.

Moreover,—ignoring the court rule analogy,—I feel that a rule, having the meaning I have ascribed to the existing rule of the Commission about terms of withdrawal of a registration statement, is well within the power conferred on the Commission by Section 19 (a) of the statute to make "regulations governing registration statements." The power exercised in adopting the rule does not impress me as legislative (United States v. Grimaud, 220 U. S. 506; United States v. Janowitz, 257 U. S. 42, 45; Avent v. United States, 266 U. S. 127). I discover nothing inhar-
[fol. 162] monious with this view in Panama Refining Co. v. Ryan, 293 U. S. 388, or in Schechter Poultry Corp. v. United States, 294 U. S. —; 55 Sup. Ct. Rep. 837, or in any other case brought to my attention by the respondent's counsel. I think the cases they rely on are plainly distinguishable on their particular facts.

Even though, however, I be in error as to the statute sufficiently prescribing a guide for adoption by the Commission of the rule complained of, it seems to me incon-

trovertibly shown that Congress has itself affirmatively sanctioned the rule. As matter of fact, the rule was promulgated by the Federal Trade Commission during the period when it was charged with administration of the Securities Act of 1933. The Securities Exchange Act of 1934, which created the Securities and Exchange Commission and transferred to the latter administration of the Securities Act, expressly provided in Section 210 that the rules theretofore issued by the Federal Trade Commission under the Securities Act should "continue in effect until modified, superseded, revoked or repealed" (48 Stat. 908-9). So far from the Securities and Exchange Commission having at all changed the rule, it has been left precisely in the same form.

Inasmuch as I regard the rule as valid and the rule itself, to the extent heretofore pointed out, continues in being a filed registration statement until the Commission consents to its withdrawal, I see no escape from holding that the proceedings with respect to the respondent's registration statement are still pending before the Commission.

The respondent suggests, rather than argues, that the examiner who issued the subpœna for him was disqualified, because an attorney of the Commission. [fol. 163] Nothing on the face of the proceedings tends to establish disqualification, unless it be the bare fact that he is an employee of the Commission. As Congress has directed that body to perform a great mass of duties and has authorized it generally to appoint attorneys, as well as other agents, to assist in the discharge of those duties, and has definitely authorized officers of the Commission to take evidence and conduct hearings (Sections 19 (b) and 21), it seems to me manifest that it was within the province of the Commission to use one of its attorneys as an examiner to conduct a hearing for the taking of testimony. Again, even though the respondent be entitled when he appears to object to going on before the person then acting as examiner, that affords no ground for collateral attack on an application to the court for an order requiring him to appear.

The respondent also charges that the Commission intends to launch into a fishing expedition on his examination as a witness. At present, however, there is nothing to indicate, and I cannot anticipate, if he appear before the Commission, that it will misbehave. It will be ample

time for him to kick when he is spurred. For the moment, therefore, Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, relied on by the respondent, is not pertinent.

Lastly, the respondent vigorously criticizes the policies of the statute. When engaged in the task of considering the validity of legislation, however, a court would trespass inexcusably outside its own domain if it gave weight to its own opinions, much more if it expressed itself, as to the [fol. 164] wisdom or unwisdom of the action of another branch of the Government. Accordingly, I refrain, as I feel obligated to refrain, from approval or disapproval of the Securities Act or the Securities Exchange Act.

Numerous additional matters have been discussed by counsel; but I do not think it necessary or even helpful to deal with them.

Motion of the respondent denied. Motion of the applicant granted. Settle order on two days' notice.

Dated August 12, 1935.

Francis G. Caffey, United States District Judge.

[fol. 165] In United States District Court, Southern District of New York

[Title omitted]

Pptition for and Allowance of Appeal

To the Honorable Francis G. Caffey, District Judge:

The above named respondent, J. Edward Jones, feeling himself aggrieved by the order and decree made and entered in this cause on the 23rd day of August, 1935, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit sitting at New York, and your petitioner further prays that a proper order be made enabling him to perfect

his appeal without the giving of security for costs or other-
[fol. 166] wise, pursuant to the provisions of Section 22-a of the Securities Act of 1933.

Dated New York, August 23, 1935.

Hyman I. Fischbach, New York, N. Y.; Harry O. Glasser, Enid, Oklahoma; J. N. Saye, Longview, Texas, Attorneys for Respondent.

The foregoing petition is granted and the appeal allowed.

Dated New York, August 23, 1935.

Francis G. Caffey, United States District Judge.

[fol. 167] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes J. Edward Jones, respondent in the above entitled proceeding and in connection with his petition for appeal simultaneously filed herewith, assigns the following errors which he avers occurred herein and upon which he relies to reverse the order and decree entered herein:

1. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission to which an order to appear and testify could attach.

2. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission on the 18th day of June 1935 out of or in aid of which the Commission was empowered to issue a subpœna.

3. The Court erred in ruling that there was a proceeding pending before the Securities and Exchange Commission in aid of which it could entertain an application under the provisions of Section 22-b of the Securities Act of 1933 as amended.

[fol. 168] 4. The Court erred in ruling that the registration statement of J. Edward Jones had become effective on May 24, 1935.

5. The Court erred in ruling that the registration statement of the respondent now continues to be effective.

6. The Court erred in ruling that the withdrawal of said registration statement which occurred on June 18, 1935, did not terminate the proceedings then pending before the Securities and Exchange Commission.

7. The Court erred in ruling that the subpœna issued on the 18th day of June 1935 had any legal force or efficacy.

8. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Securities and Exchange Commission was empowered to have the respondent attend before it as a witness.

9. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Commission's powers in the premises extended beyond affording an opportunity for hearing.

10. The Court erred in refusing to rule that under the provisions of the Securities Act of 1933 as amended, it is entirely optional with a registrant to determine whether he should take advantage of the opportunity for hearing therein prescribed or, at his discretion, submit to a stop order without a hearing.

11. The Court erred in ruling that the sufficiency of the petition of the applicant should not be determined by the [fol. 169] same standards and requirements applicable to all other pleadings in the District Court.

12. The Court erred in ruling that it had jurisdiction to entertain the application under the provisions of Section 22-b of the Securities Act of 1933, as amended, in the face of the pending petition for review in the Circuit Court of Appeals of the Second Circuit.

13. The Court erred in ruling that it had jurisdiction to entertain the application lodged before it in view of the pendency in the Circuit Court of Appeals for the Second Circuit of a petition to review the identical questions.

14. The Court erred in ruling that the institution of proceedings in the Circuit Court of Appeals for the Second Circuit, pursuant to the provisions of Section 9-a of the Securi-

ties Act as amended, did not divest the District Court of jurisdiction to hear and determine the identical questions.

15. That in interpreting the questions raised concerning the validity and constitutionality of certain provisions of the Securities Act of 1933, the Court erred in ruling that such act should be construed so as to bring the enactment thereof within the powers of Congress.

16. The Court erred in ruling that all doubts as to the constitutionality of the Securities Act of 1933 as amended, by which act the civil and criminal liability of citizens was drastically enlarged, must be resolved in favor of constitutionality.

[fol. 170] 17. The Court erred in ruling that Congress, in the exercise of that power conferred upon it by Section 8, Clauses 3, 7 and 18 of the Constitution of the United States, had the authority to enact Section 5 of the Securities Act of 1933, as amended.

18. The Court erred in ruling that the enactment of the Securities Act of 1933 was a proper legislative function of Congress and a proper exercise of the powers granted it under the Constitution.

19. The Court erred in refusing to rule that the Securities and Exchange Commission had no legal existence and was not lawfully created.

20. The Court erred in refusing to rule that the process of the Securities and Exchange Commission was void and without legal efficacy.

21. The Court erred in refusing to rule that the Securities Act of 1933 as amended was unconstitutional and void by reason of being violative of and repugnant to provisions of the 4th, 5th, 9th, 10th and 14th amendments to the Constitution of the United States.

22. The Court erred in refusing to rule that the Securities Act of 1933 was void as an attempted delegation of legislative power to the Securities and Exchange Commission and therefore violative of and repugnant to the provisions of the 4th, 5th and 9th amendments to the Constitution of the United States.

23. The Court erred in refusing to rule that the Securities Act of 1933 as amended is unconstitutional and void by reason of such legislation being an attempt to usurp powers [fol. 171] reserved to the respective states and the people thereof by the 10th amendment to the Constitution of the United States.

24. The Court erred in refusing to rule that the activities of the respondent in the sale in New York and elsewhere of units of ownership in oil production in the State of Oklahoma are not subject to regulation by the Federal Government.

25. The Court erred in refusing to rule that the business of the respondent is not a business involving a public offering of securities in interstate commerce within the regulatory control of the Federal Government.

26. The Court erred in ruling that the Securities and Exchange Commission had power to enact, "release" or "rule" 47 and erred in failing to rule that such power, if vested in the Commission by the terms of the Act is void as a prohibited delegation of legislative powers.

27. The Court erred in ruling that Rule 47 was validly enacted.

28. The Court erred in ruling that the Securities and Exchange Commission had acted validly under the provisions of Rule 47.

29. The Court erred in ruling that the Securities and Exchange Commission had the authority under the provisions of Rule 47 to refuse the respondent the right to withdraw a registration statement previously filed by him.

30. The Court erred in failing to rule that Rule 47 had no force or legal effect by reason of it having been adopted [fol. 172] contrary to and in violation of the provisions of Section 19-a of the Securities Act of 1933 as amended.

31. The Court erred in refusing to rule that the action of the Securities and Exchange Commission under and pursuant to the provisions of Rule 47 in denying the respondent the right to withdraw a registration statement previously filed by him was arbitrary and void and violative of the plain language of said rule.

32. The Court erred in refusing to rule that the denial by said Securities and Exchange Commission of the respondent's right to withdraw the registration statement previously filed by him was void by reason of being discriminatory as well as arbitrary.

33. The Court erred in ruling that it was within the power of Congress to delegate to an administrative tribunal the power to enact regulations having the force of law and subjecting persons guilty of a violation of such regulations to penal fine, imprisonment and penal servitude.

34. The Court erred in ruling that the right of the respondent to withdraw the registration statement previously filed by him was not absolute in the absence of a showing on the record that the public interest and the protection of investors otherwise required.

35. The Court erred in refusing to rule that the proceedings of the Securities and Exchange Commission conducted by one of its attorneys did not deprive the respondent of due process of law.

36. The Court erred in refusing to rule that proceedings of the Securities and Exchange Commission conducted by [fol. 173] one of its attorneys were illegal and improper by reason thereof.

37. The Court erred in refusing to rule that the proceedings of the Securities and Exchange Commission subsequent to June 18, 1935, were illegal and improper by reason of the withdrawal of the registration statement on said date.

38. The Court erred in ruling that the Securities and Exchange Commission had jurisdiction over the subject matter of the business of the respondent.

39. The Court erred in refusing to rule that oil royalties and interests in oil and gas production are interests in realty and not securities.

40. The Court erred in ruling that oil royalties and interests in oil and gas production are securities subject to regulation by the Federal Government.

41. The Court erred in refusing to rule that the definition of the term "security", as including oil royalties or fractional undivided interests in oil, gas or other mineral rights

contained in Section 2, subdivision 1 of the Securities Act of 1933 as amended, is contrary to the positive law of oil-producing states and therefore beyond the power of Congress to so declare.

42. The Court erred in failing to rule that the Securities and Exchange Commission had an adequate statutory remedy at law by reason of being able in the state of the record before it to enter a stop order, the existence of which remedy precluded the intervention of equity.

[fol. 174] 43. The Court erred in refusing to rule that the course of conduct being pursued by the Securities and Exchange Commission in the cause at bar was contrary to the standards stated by Mr. Justice Holmes in

Federal Trade Commission vs. American Tobacco Co., 264 U. S. 298.

44. The Court erred in ruling that the objections of the respondent to the course of action being pursued by the Securities and Exchange Commission were premature.

45. The Court erred in granting the applicant's motion and in entering its order accordingly.

Wherefore, J. Edward Jones, plaintiff in error, prays that the order or decree of said Court be reversed, etc.

Hyman I. Fischbach, New York, N. Y.; Harry O. Glasser, Enid, Oklahoma; J. N. Saye, Longview, Texas, Attorneys for J. Edward Jones, Respondent Appellant.

[fol. 175] Citation, in usual form, omitted in printing.

[fol. 176] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that Exhibits A,

B; C and D annexed to the answer of J. Edward Jones, being identical with Exhibits F, G, H and I, in the Petition for Review, need not be reproduced as part of the Jones answer, but will appear in the Petition for Review printed in the record.

Dated New York, September 18, 1935.

John J. Burns, Attorney for Applicant-Appellee.

H. I. Fischbach, Attorney for Respondent-Appellant.

[fol. 177] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated September 20th, 1935.

H. I. Fischbach, Attorney for Respondent-Appellant.

John J. Burns, Attorney for Applicant-Appellee.

On reading the foregoing consent of the proctors for the respective parties herein, it is ordered that the foregoing printed record be filed in lieu of the original papers for the purpose of certifying a record on appeal.

Dated September —, 1935.

Francis G. Caffey, U. S. D. J.

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

J. EDWARD JONES, Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, Respondent

SECURITIES AND EXCHANGE COMMISSION, Applicant-Appellee,

against

J. EDWARD JONES, Respondent-Appellant

Before Manton, L. Hand and Swan, Circuit Judges

Petitioner, J. Edward Jones, files a petition to review an order of the Securities and Exchange Commission, pursuant to Sec. 9 (a) of the Securities Act (48 Stat. 80, 15 U. S. C. Sec. 776). Petition dismissed. Also an appeal from the United States District Court for the Southern District of New York in a suit brought by the Securities and Exchange Commission against J. Edward Jones, to direct his submission to examination pursuant to a subpœna issued and served upon him. Order granted; respondent appeals. Affirmed.

H. I. Fischbach, Esq., Harry O. Glasser, Esq., J. N. Saye, Esq., Attorneys for Appellant. John J. Burns, Esq., General Counsel, Securities and Ex-[fol. 180] change Commission, Attorney for and of Counsel with Respondent and Applicant-Appellee. Francis Currie, Esq., Charles R. Kaufman, Esq., Francis S. Walker, Esq., of Counsel.

MANTON, Circuit Judge.

Appellant filed a registration statement covering a forthcoming issue of participation trust certificates pursuant to Sec. 6 of the Securities Act of 1933 as amended (48 Stat. 74; 48 Stat. 905; 15 U. S. C. Sec. 77a) with the appellee. It was filed May 4, 1935 and on May 23, 1935 notice of a hearing on this statement was sent to the appellant by the Commission. On June 18th a hearing was had and appellant attempted to withdraw his registration statement

which was denied by the officer conducting the hearing for the Commission. This ruling was based on the regulation of the Commission providing:

"Any registration statement or any amendment thereof may be withdrawn upon the request of the registrant if the Commission consents thereto * * * which consent shall be given by the Commission with due regard to the public interest and the protection of investors."

(Release No. 47 of the Federal Trade Commission, Sept. 22, 1933.)

Appellant filed a petition to review the action of the Commission refusing permission of withdrawal of his registration statement. The appellee moves to dismiss the petition to review contending that it was prematurely brought since no order had been entered by the Commission within the meaning of Sec. 9 (a) of the Securities Act (48 Stat. 80; 15 U. S. C. 77i) and that therefore the court has no jurisdiction to entertain this petition. Section 9 (a) grants [fol. 181] any person aggrieved by an order of the Commission a review thereof in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his place of business. Since no stay was granted by this court pursuant to Sec. 9 (b) of the Securities Act, the Commission, on July 3, 1935, filed a petition in the District Court for the Southern District of New York, pursuant to Sec. 22 (b) of the Act (48 Stat. 86; 15 U. S. C. Sec. 77v), for an order directing the appellant to appear and testify before an officer of the Commission pursuant to a subpœna which the Commission had previously served on the appellant and which he had failed to obey. The appellant appeared in opposition to this petition; a hearing was had and the court granted the order directing the appellant to appear and testify in the matter of the registration statement he had filed. The respondent therein named appealed to this court. The two causes have been consolidated.

The appellee moves to dismiss the petition to review urging that no order has been entered which the petitioner might review in this court. The orders of the Commission referred to are to be found in Secs. 8 (b), 8 (d) and 8 (e), all preceding Sec. 9, which provides for a review of the orders. Section 8 (b) authorized an order refusing to per-

mit a registration statement to become effective until it has been amended as required in the order. Sections 8 (d) and 8 (e) provide for the entry of a stop order suspending the effectiveness of the registration statement at any time. Notice of hearings and proceedings under these sections must be given and the Commission must make a final determination of fact before such orders may be entered. They would then become final orders of the Commission. The order sought here to be reviewed is not of either type. It [fol. 182] is an interlocutory ruling in the proceeding and hearing which was within the control of the Commission as a tribunal until some final determination was made. Interlocutory orders of a court are not receivable except where it has been provided by statutory authority. Illustrations of this is the jurisdiction of this court provided for by Sec. 128 of the Judicial Code (28 U. S. C. 225) which provides that the Circuit Court of Appeals may review only final decisions of the district court and certain enumerated interlocutory orders or decrees granting, refusing or modifying interlocutory injunctions and receiverships or involving extraordinary relief. Herrup v. Stoneham, 15 Fed. 2, 49 (C. C. A. 2); France & Canada S. S. Co. v. French Republic, 285 Fed. 290 (C. C. A. 2); Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp., 266 Fed. 625, 632 (C. C. A. 2). These principles have been applied to interlocutory rulings of administrative tribunals. Chamber of Commerce of Minneapolis v. Fed. Trade Comm., 280 Fed. 45 (C. C. A. 8). We do not think that Congress intended by any provision of this act to permit reviews by the Circuit Courts of Appeals of interlocutory and procedural orders entered by the Securities and Exchange Commission.

The stop order hearings authorized by the Act are summary proceedings for the protection of investors against misrepresentation and omissions of a registration statement. We think it is when a final order is entered as a result of the hearings that the act intends the appellant might have a right of review of that determination. No order under Sec. 8 (b) was entered and the registration here became effective May 24th. It remained effective since no stop order was issued under Sec. 8 (d). Under such circumstances the denial of a motion to withdraw the registration reflected no injury upon the appellant. The

[fol. 183] motion to dismiss the petition to review is granted.

Appellant appeals from an order directing him to appear and testify before the Commission regarding his registration statement. It was entered pursuant to Sec. 22 (b).

The answer of the appellant sets up the invalidity of the statute on constitutional grounds and also denies jurisdiction of the Commission to make the application after his motion to dismiss. If he could withdraw his registration by mere request, it would end the effect of filing it and there is no authority under sec. 19 (b) to issue the Commission subpœna and it could not be enforced by order of the district court under Sec. 22 (b).

The appellant contends that the securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control over the use of the mails, is fully sustained by the cases which have considered the mail fraud statutes. Badders v. United States, 240 U. S. 391; Public Clearing House v. Coyne, 194 U. S. 497; In re Rapier, 143 U. S. 110; Ex parte Jackson, 96 U. S. 727. It is not an unreasonable method of preventing the use of the mails to promote and consummate the sales of misrepresented securities, to require that all securities, before mails are used, must be registered. Lewis Publishing Co. v. Morgan (229 U. S. 288) upheld the exaction of certain information as a condition precedent to a newspaper's classification as second class matter. Congress clearly had the power to enact the provision excluding securities from the use of the mails unless a true statement describing them was filed in a public office in Washington. The postal power, like all other powers of Congress, is subject to the limitations imposed by the Bill of Rights (Milwaukee Pub. v. Burleson, 255 U. S. 407, 430; Burton v. United States, 202 U. S. 344, 371). But admitting such limitation, we think there was sufficient authority for the mail sections of the Securities Act. The claim that the registration requirements violated due process of law is without force. Registration of all securities whether good or bad, required by state blue sky laws have been upheld as no violation of the due process clause. Hall v. Geiger-Jones, 242 U. S. 539; Caldwell v. Sioux Falls Stock Yards Co., 42 U. S. 559; Merrick v. Halsey & Co., 242 U. S. 568. Similar registra-

tion required of securities within the jurisdiction by the Federal government would likewise be clear of the inhibitions of due process in the Fifth Amendment. If the act is constitutional so far as it forbids the use of the mails, that is sufficient for our present consideration. Section 26 of the Act contains a provision that the invalidity of one part shall not invalidate the rest.

Another constitutional objection advanced is that there was an unconstitutional delegation of power by Congress in leaving the determination of rules to the Commission. Schechter Poultry Corp. v. United States (295 U. S. 495) and Panama Refining Co. v. Ryan (293 U. S. 388) did not decide that any delegation of authority to control details of administration was void. They expressly recognized that details of a subordinate nature may be supplied by administrative regulations. The delegation of authority to the commission was merely power to supply these necessary flexible details. Since the powers delegated are of this character, they appear to be within the ruling deciding that similar delegation to the Federal Trade Commission was not unlawful. Avent v. United States, 266 U. S. 127; Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194. The power to make rules regulating registration is very different from that in the case of the Panama [fol. 185] Refining Co. case, supra, where there was "no criterion to govern the President's course", and from that in the Schecter case, supra, where the delegation was similar. In both these cases, the executive received the power to affect fundamental provisions of the law. This is entirely different from the power which was set up by an administrative mechanism. Further, those cases seem to have held that there was no necessity for the broad delegation of power. Such cannot be said of the Securities Act. See: 1935, 48 Harvard Law Review, 798. We think that Sec. 19 (a) of the Act (48 Stat. 85, 15 U. S. C. 77s) is constitutional.

The action of the Commission in refusing to allow the withdrawal was proper. Section 19 (a) of the statute authorized the Commission to make such rules and regulations as shall be necessary to carry out the provisions of the title. It would seem necessary to the prevention of the use of the facilities of the mail in the promotion of securities about which no responsible information is on file,

to deny a desired withdrawal. The commission properly argues that an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective, to withdraw before a stop order was issued and then to submit another statement with slight changes. This would present a real administrative difficulty and for this reason the Commission's Release 47 seems within the authority granted by Section 19 (a). Moreover, the right of the appellant to withdraw his registration may properly be conditioned by the Commission in view of the public interest. In re J. R. Palmenberg Sons, 76 Fed. 2, 935, (C. C. A. 2); Young v. So. Pac., 25 Fed. 2, 630 (C. C. A. 2); American Zylonite Co. v. Celluloid Mfg. Co., 32 Fed. 809.

The Commission's authority to subpœna the appellant [fol. 186] and compel him to testify seems clear. Appellant advanced the unconstitutionality of the Securities Act and thus a ruling on this is necessary, even though the Commission's denial of the petition to withdraw is not reviewable by us. The appellee's right to the power to subpœna witnesses for examination is based upon Sections 8 (d), 8 (e) and 19 (b). Appellant argues there is an operative distinction between "investigation" as used in Section 19 (b) and "examination" as it is referred to in Sec. 8 (d) and 8 (e) and contends that Sec. 8 (d) and Sec. 8 (e) do not authorize the compulsion of witnesses to attend an examination with any greater sanction than the issuance of a stop order. The distinction between "examination" and "investigation" is not as potent as argued by appellant. Section 22 (b) of the Act authorizing a district court to order the appearance of a contumacious witness, speaks of "examiners" designated by the Commission. If the appellant's contention was sound, those conducting "investigations" would be "examiners" and those conducting "examination" within Sec. 8 (d) and Sec. 8 (e) would not be "examiners". Moreover, the power granted by Sec. 19 (b) is for an investigation "necessary and proper" for the enforcement of the act. A proceeding under Sec. 8 (d) is such an investigation. It is a violation of the act for a registrant to include in a registration statement filed with the Commission, an untrue statement of a material fact or an omission of a material fact which should be stated. If

such conduct is wilful it is a criminal offense under Sec. 24. The obvious investigation for the purpose of detecting these violations is the hearing provided for in Sec. 8 (d).

The contention that the appellee's only sanction to compel attendance at the hearings is the issuance of a stop order is erroneous. The appellee is authorized to issue [fol. 187] the stop order if the issuer, or underwriter, refused to cooperate. If this were the limit of the Commissioner's authority, an underwriter could force a stop order which would injure the innocent issuer and there would be no compulsory power over third persons at all since the stop order is authorized only if the issuer or underwriter prove unwilling to cooperate. Yet the appellee is empowered to examine the issuer, underwriter or any other person. A proper conduct of a hearing under Sections 8 (d) and 8 (e), which determines the rights of the parties, requires that the administrative body conducting the hearing, have complete power to compel production of any evidence necessary to the final determination. Only a stop order could have ended the effectiveness of the registration here and the hearing to determine whether to issue one was authorized and the issuance of a subpœna was lawful.

The court below properly directed the appellant's attendance as a witness.

Order affirmed.

Filed No. 4, 1935.

[fol. 188] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 12th day of November, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION, Applicant-Appellee,

vs.

J. EDWARD JONES, Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 189-198] Endorsed: United States Circuit Court of Appeals, Second Circuit. Securities and Exchange Commission vs. J. Edward Jones. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1935. William Parkin, Clerk.

[fol. 199] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

J. EDWARD JONES, Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, Respondent

SECURITIES AND EXCHANGE COMMISSION, Applicant-Appellee,

against

J. EDWARD JONES, Respondent-Appellant

Before Manton, L. Hand and Swan, Circuit Judges

H. I. Fischbach, Esq., Harry O. Glasser, Esq., J. N. Saye, Esq., Attorneys and Solicitors for Petitioner-Appellant.

Per CURIAM:

Petition for rehearing denied.

——— ———, Circuit Judges.

Filed Nov. 21, 1935.

[fol. 200] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 21st day of November, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

J. EDWARD JONES, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent

SECURITIES AND EXCHANGE COMMISSION, Applicant-Appellee,

vs.

J. EDWARD JONES, Respondent-Appellant

A petition for a rehearing having been filed herein by counsel for J. Edward Jones,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 201] Endorsed: United States Circuit Court of Appeals, Second Circuit. J. Edward Jones vs. Securities and Exchange Commission (and another case). Order. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 21, 1935. William Parkin, Clerk.

[fol. 202] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 201, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Securities and Exchange Commission, Applicant-Appellee, against

J. Edward Jones, Respondent-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of November, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal, United States Circuit Court of Appeals, Second Circuit.)

[fol. 203] SUPREME COURT OF THE UUITED STATES.

ORDER ALLOWING CERTIORARI—Filed February 3, 1936.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,194. U. S. Circuit Court of Appeals, Second Circuit. Term No. 640. J. Edward Jones, Petitioner, vs. Securities and Exchange Commission. Petition for writs of certiorari and exhibits thereto. Filed December 17, 1935. Term No. 640, O.T., 1935.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

Nos. 639 and 640

J. EDWARD JONES,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES M. BECK,
BAINBRIDGE COLBY,
HARRY O. GLASSER,
J. N. SAYE,
H. I. FISCHBACH,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

Nos. 639 and 640

J. EDWARD JONES,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, J. Edward Jones, respectfully prays that Writs of Certiorari issue to review final judgments of the Circuit Court of Appeals for the Second Circuit, the decisions and opinions in which were filed on November 4th, 1935, and upon which petition for rehearing was denied November 21st, 1935.

Statement of the Matters Involved.

The petitioner, J. Edward Jones, is a citizen of the State of New York. He resides in Scarsdale, County of Westchester, State of New York, and has his principal place of business at 342 Madison Avenue, City, County and State

of New York, both of such addresses being within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The respondent is an administrative tribunal organized and existing under and by virtue of Section 4 of the Securities Exchange Act of 1934 (48 Stat. 885, 15 U. S. C. A., 78d).

On May 4, 1935, the petitioner filed with the respondent, a registration statement upon a proposed issue of participation trust certificates of proportionate ownerships in producing oil wells, for a total authorization of 1,000 certificates at the aggregate offering price of One Hundred Thousand Dollars ($100,000.00), pursuant to Section 6(a) of the Securities Act of 1933. (15 U. S. C. A. 77f) (R. Case No. 639, p. 9-89). Said registration statement, if action had not been taken with regard thereto by the respondent, would have become effective the twentieth day after the filing thereof. (Section 8(a) Securities Act of 1933; 15 U. S. C. A. 77h(a)).

However, on May 23, 1935, the day before said registration statement would have become effective, the respondent sent a telegram to the petitioner in which it was stated (in substance), that it appeared to the respondent that said registration statement included untrue statements of material facts and omitted to state material facts required to be stated therein and material facts necessary to make the statements therein not misleading. The petitioner was also informed that a hearing upon the matter would be held at the office of the respondent in Washington, D. C., at 10 A. M., Thursday, June 6, 1935, at which time and place the petitioner might appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement (R. Case No. 639, p. 90-91). The hearing was continued until June 18, 1935. On June 13,

1935, George C. Mathews, one of the Commissioners, issued a subpœna duces tecum, commanding the petitioner to appear before William Green, an officer of the Securities and Exchange Commission, at the office of the Commission in Washington, D. C., on the 18th day of June, 1935, at 10 o'clock A. M. of that date, to testify with reference to his registration statement and to bring with him certain books and records specified in the subpœna (R. Case No. 639, p. 91-92). The petitioner appeared at the hearing on June 18th, 1935, by counsel. He did not appear in person. His counsel stated orally to the examiner who was conducting the hearing that the petitioner was formally withdrawing his registration statement (R. Case No. 639, p. 121). The examiner denied the right to withdraw the registration statement, and proceeded with the hearing (R. Case No. 639, p. 121-150). The hearing was not concluded on June 18, but was adjourned until June 27, 1935 (R. Case No. 639, p. 150-151).

On June 18, 1935, William Green, an officer of the respondent, issued a subpœna to the petitioner requiring him to appear before said officer at the office of the respondent in Washington, D. C., on the 27th day of June, 1935, to testify in the matter of the hearing on the registration statement of the petitioner (R. Case No. 639, p. 99).

The petitioner refused to obey this subpœna in person. His counsel appeared at said hearing, specially and for the purpose of dismissal only, and presented to the presiding officer a motion, signed and sworn to by the petitioner, dismissing and withdrawing his registration statement. This motion was denied by the respondent (R. Case No. 639, p. 180). His counsel then filed another motion to dismiss the registration statement, which was signed by counsel and sworn to by petitioner (R. Case No. 639, p. 101-103). This motion also was denied by the respondent (R. Case No. 639, p. 180).

Through his counsel, petitioner then presented to the officer presiding at said hearing a motion to quash the subpœna which had been issued by said officer and served upon the petitioner. This motion was signed by petitioner's counsel, but sworn to by him (R. Case No. 639, p. 103-105). It was likewise denied by the respondent (R. Case No. 639, p. 180-181).

Through his counsel, petitioner then presented to the respondent an objection to the jurisdiction of the respondent to proceed further in the matter, which document was signed by the petitioner's counsel but sworn to by the petitioner (R. Case No. 639, p. 105-108). This objection was overruled by the respondent. (R. Case No. 639, p. 181), to all of which proceedings the petitioner asked and was granted exceptions.

The Securities Act of 1933, before the amendment of 1934, was administered by the Federal Trade Commission (Title 1, Securities Act of 1933, Sub-section 5 of Section 2; 15 U. S. C. A. 77b(5)). By the amendment of June 6, 1934, the duties of the Federal Trade Commission were transferred to the Securities and Exchange Commission, and all orders, rules and regulations which had been issued by the Federal Trade Commission under the Securities Act of 1933 were continued in full force and effect until superceded, revoked or repealed by the Securities and Exchange Commission. (June 6, 1934, c. 404, Section 210, 48 Stat. 908; 15 U. S. C. A. 78ii.) The respondent, in issuing the aforesaid orders, relied as its authority upon a *rule*, termed Release No. 47, which had been promulgated and issued by the Federal Trade Commission. That part of Release No. 47 which is pertinent to the issues herein involved reads:

> "Any registration statement or amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. * * * Such consent shall be given by the Commission with due re-

gard to the public interest and the protection of investors."

Being aggrieved by the aforesaid orders of the respondent, the petitioner, pursuant to Section 9(a) of the Securities Act of 1933 (15 U. S. C. A. 77i(a)), filed a petition in the United States Circuit Court of Appeals for the Second Circuit, praying for a review thereof (R. Case No. 639, p. 2-7).

The Circuit Court of Appeals dismissed the petition for review on the ground that it was authorized under the Securities Act to review final orders of the respondent only, and held that the orders mentioned above were not *final* orders, as contemplated by said Act.

Stay order not having been issued by the Circuit Court of Appeals when the petition for review was filed in that court, the respondent proceeded under Sub-section (b) of Section 9 of the Securities Act (15 U. S. C. A. 77i(b)).

After the petitioner had filed his petition for review in the Circuit Court of Appeals, the respondent, pursuant to Section 22(b) of the Securities Act of 1933 (15 U. S. C. A. 77v(b)), on July 3, 1935, filed an application in the District Court of the United States for the Southern District of New York for an order requiring the petitioner to appear before William Green, an officer of the Securities and Exchange Commission, there to give evidence in the hearing and examination entitled, in the matter of the registration statement of J. Edward Jones, File 2-1408-1 (R. Case No. 640, p. 3-23).

In response to a rule to show why the respondent's application should not be granted by the District Court, the petitioner appeared in that court and challenged:

(1) the jurisdiction of the court to require obedience to the subpœna of the respondent, because of the proceedings pending in the Circuit Court of Appeals to review the act

of the respondent in denying the petitioner the right to withdraw his registration statement;

(2) the authority of the respondent to issue a subpœna to compel petitioner's attendance;

(3) the validity of the orders of the respondent denying the right to withdraw his registration statement and in overruling his various motions to withdraw and dismiss the proceedings before the respondent, and in refusing to quash the subpœna issued by the respondent and served upon petitioner;

(4) the validity of Federal Trade Commission's Release No. 47, as (a) being unauthorized by the Securities Act of 1933, and, (b) because it had not been published as required by Section 19(a) of the Act (15 U. S. C. A. 77s), and (c) because the release contained no findings of fact to show that such rule was (or is) necessary to carry out the provisions of the Act;

(5) the validity of the respondent's orders denying the petitioner's motions to dismiss and withdraw his registration statement were further challenged because no finding of fact was made by the respondent in making said orders, which would bring them within an exception to that part of Release No. 47 which requires that the respondent's consent to an application to withdraw a registration statement be given with due regard to the public interest and the protection of investors;

(6) the validity of the Securities Act of 1933, as amended, because:

(a) it is an unlawful attempt upon the part of the Congress to delegate its legislative powers to respondent;

(b) it is an attempt upon the part of the Congress to regulate the purchase and sale of securities and the acts and conduct of those engaged in that business, in violation of the 10th Amendment to the Federal Constitution;

and,

(c) the act, as construed and applied by the respondent, violates the 4th and 5th Amendments to the Federal Constitution.

The District Court overruled all of the aforesaid contentions of the petitioner, held Release No. 47 to be authorized by the Securities Act, that it had been properly promulgated and issued by the respondent, and was a valid rule; that the respondent was authorized, under the Act and under said rule, to deny petitioner's motions to dismiss his registration statement, and held that the Securities Act was a proper exercise of Congressional authority under Article 1, Section 8, of the Federal Constitution, which confers upon the Congress power (1) to regulate commerce with foreign nations and among the several states, and (2) to establish post offices and post roads, and ordered the petitioner to obey the respondent's subpœna.

The petitioner duly prosecuted an appeal from the order of the District Court to the Circuit Court of Appeals for the Second Circuit. That court consolidated the petition for review and the case on appeal.

The Circuit Court of Appeals dismissed the petition for review on the ground that the orders of the respondent denying the petitioner's motions to dismiss and withdraw his registration statement and to quash the subpœna served upon him were not orders which the petitioner was entitled to have reviewed by that court under Section 9(a) of the Securities Act (15 U. S. C. A. 77i(a)). In the case

which was appealed from the District Court, the Circuit Court of Appeals upheld the validity of Release No. 47 and the orders of the respondent denying the various motions of the petitioner to withdraw and dismiss his registration statement, the order refusing to quash the subpœna served upon him, and upheld the Securities Act as a valid exercise of power by the Congress under Article 1, Section 8, of the Federal Constitution, which confers on the Congress the power to establish post offices and post roads. The Circuit Court of Appeals pretermitted a decision upon the question as to whether or not the Securities Exchange Act could be sustained under the commerce clause of the Federal Constitution as being unnecessary to a determination of the case at bar. The appellate court affirmed the order of the lower court directing the petitioner to appear before the Commission and testify in accordance with its subpœna (Opinion of Circuit Court of Appeals, R. Case No. 640, p. 179-185).

A petition for rehearing was duly filed in the Circuit Court of Appeals and denied (R. Case No. 640, p. 187).

Reasons Relied On for Allowance of Writs.

I.

The United States Circuit Court of Appeals has, in these cases, decided important questions of Federal law which have not been, but should be, settled by this Court.

II.

The United States Circuit Court of Appeals, in these cases, has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

III.

The questions involved in these cases are matters of great importance because they involve the administration of the

Securities Act of 1933, as amended, which Act, if permitted to stand, affects the substantial rights of not only the petitioner, but all other persons, firms and corporations who issue, deal in, sell and purchase securities (with a few exempt securities specified in the Act), by the use of the mails or the instrumentalities of interstate commerce.

IV.

The United States Circuit Court of Appeals has erroneously held:

(a) That the three orders of the respondent denying the petitioner's right to withdraw and dismiss his registration statement, and the order of the respondent refusing to quash its subpœna served upon petitioner, commanding him to appear before it and testify, are not such orders as may be reviewed by the United States Circuit Court of Appeals under Section 9(a) of the Securities Exchange Act of 1933, as amended.

(b) In the case appealed from the United States District Court, that the orders of the respondent mentioned in the preceding paragraph are valid orders, authorized by the Securities Act of 1933, and that their enforcement does not deprive petitioner of his liberty and property in violation of the due process clause of the 5th Amendment to the Federal Constitution.

(c) That Release No. 47 of the Federal Trade Commission is a valid rule authorized by the Securities Act of 1933, as amended; that the operation and effect of Release No. 47 does not deprive petitioner of his liberty and property without due process of law.

(d) That, after petitioner dismissed and withdrew his registration statement, there was still pending before the Securities and Exchange Commission a proceeding over

which it had jurisdiction and in which it could compel the petitioner to appear and testify.

(e) That after petitioner had dismissed and withdrawn his registration statement, there was still pending before the Securities and Exchange Commission a proceeding in which the District Court could compel the petitioner to obey the subpœna of the respondent and appear before it and testify pursuant to Section 22(b) of the Securities Exchange Act of 1933, as amended.

(f) That "it is not an unreasonable method of preventing the use of the mails to promote and consummate the sale of misrepresented securities to require that all securities, before mails are used, must be registered."

(g) That the Securities Act of 1933, as amended, is not an invasion of the rights of the States by the Congress, contrary to the 10th Amendment to the Federal Constitution.

(h) That the penalties and punishments sanctioned for a violation of the Securities Exchange Act of 1933, as amended, and for violation of the rules and regulations of the Securities and Exchange Commission, are not so severe and drastic that they are designed and calculated to, and do, affright and deter those affected by the Act and such rules and regulations, from asserting their rights in the courts of justice, in violation of the 5th Amendment to the Federal Constitution.

Eleven certified copies of the entire record in each of the cases in the said Circuit Court of Appeals are hereby furnished, attached to and made a part of this application and marked Exhibit A, in compliance with Rule 38 of this Honorable Court.

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of

this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, "J. Edward Jones, Petitioner, against Securities and Exchange Commission, Respondent," and a full and complete transcript of the record and all proceedings in the case entitled on its docket, "Securities and Exchange Commission, Applicant-Appellee, against J. Edward Jones, Respondent-Appellant," and that said decrees of the United States Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JAMES M. BECK,
BAINBRIDGE COLBY,
HARRY O. GLASSER,
J. N. SAYE,
H. I. FISCHBACH,
Counsel for Petitioner.

BRIEF.

I.

The Opinions of the Courts Below.

The opinions of the courts below have not been reported. The opinion of the District Court appears in the record of Case No. 640, at pages 154-164. The opinion of the Circuit Court of Appeals in the same case is dated November 4, 1935, and appears in the record of Case No. —, at pages 179 to 185. The opinion of the Circuit Court of Appeals in Case No. 639 is also dated November 4, 1935, and appears in the record of Case No. 639 at pages 184 to 191.

II.

Jurisdiction.

1. The dates of the decrees of the Circuit Court of Appeals are November 4, 1935 (R. Case No. 639, p. 184-191; R. Case No. 640, p. 179-185). The petition for rehearing was filed November 18, 1935. It was denied November 21, 1935 (R. Case No. 639, p. 192; R. Case No. 640, p. 187).

2. Petitioner asserts that the Circuit Court of Appeals erred in holding:

(a) that the three orders of the respondent denying the petitioner's right to withdraw and dismiss his registration statement, and the order of the respondent refusing to quash its subpœna served upon petitioner, commanding him to appear before it and testify, are not such orders as may be reviewed by the United States Circuit Court of Appeals under Section 9(a) of the Securities Act of 1933, as amended;

(b) in the case appealed from the United States District Court, that the orders of the respondent mentioned

in the preceding paragraph are valid orders, authorized by the Securities Act of 1933, and that their enforcement does not deprive petitioner of his liberty and property in violation of the due process clause of the 5th Amendment to the Federal Constitution;

(c) that Release No. 47 of the Federal Trade Commission is a valid rule authorized by the Securities Act of 1933, as amended; that the operation and effect of Release No. 47 do not deprive petitioner of his liberty and property without due process of law;

(d) that, after petitioner had dismissed and withdrawn his registration statement, there was still pending before the Securities and Exchange Commission a proceeding over which it had jurisdiction and in aid of which it could issue a subpœna and compel the petitioner to appear and testify;

(e) that, after petitioner had dismissed and withdrawn his registration statement, there was still pending before the Securities and Exchange Commission a proceeding in which the District Court could compel the petitioner to obey the subpœna of the respondent and appear before it and testify pursuant to Section 22(b) of the Securities Act of 1933, as amended.

(f) that "it is not an unreasonable method of preventing the use of the mails to promote and consummate the sale of misrepresented securities to require that all securities, before mails are used, must be registered;"

(g) in holding that the respondent might compel the petitioner to take advantage of the opportunity afforded him for a hearing under Subsections (b) and (d) of Section 8 of the Securities Act, and attend such

hearings and give testimony, instead of issuing the stop order therein provided for, if the petitioner elected to waive advantage of the opportunity afforded in said sub-sections for a hearing, especially when at the time none of the participation trust certificates had been sold to the public and the rights of no innocent underwriter had become affected;

(h) that the Securities Act of 1933, as amended, is not an invasion of the rights of the States by the Congress, contrary to the 10th Amendment to the Federal Constitution;

(i) that the penalties and punishments sanctioned for a violation of the Securities Act of 1933, as amended, and for violations of the rules and regulations of the Securities and Exchange Commission, are not so severe and drastic that they are designed and calculated to, and do, affright and deter those affected by the Act and such rules and regulations, from asserting their rights in the courts of justice, in violation of the 5th Amendment to the Federal Constitution.

3. The jurisdiction of the Supreme Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925; and Supreme Court Rule No. 38.

III.

Statement of the Case.

A full statement is set forth in the petition under heading, "Statement of Matters Involved."

IV.

Specification of Errors.

For the sake of brevity, petitioner adopts as his specification of errors the assignments under IV, in the "State-

ment of Matters Involved'' in his petition, and under Subsection 2, heading II, of this brief.

V.

Summary of Argument.

Point A. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Point B. The Circuit Court of Appeals has decided a Federal question of law probably in conflict with applicable decisions of this Court.

Point C. The questions involved in this case are matters of great importance because they involve the administration of the Securities Act of 1933, as amended, which Act, if permitted to stand, affects the substantial rights of not only the petitioner, but all other persons, firms and corporations who issue, deal in, sell and purchase Securities (with a few exempt securities specified in the Act), by the use of the mails, or the Instrumentalities of Interstate commerce.

Point A.

The Securities Act of 1933, as amended, is another piece of novel legislation. To say the least, it is a radical departure from what we have heretofore understood to be time-honored American traditions. It is unquestionably an attempt by the National Government to exercise powers heretofore universally believed to have been reserved to the States.

It creates and vests in the National Government new and virtually unlimited powers of regulation of the minutest details of the business and affairs of men who issue, purchase and sell securities. If upheld in its entirety, it wipes

out State lines and destroys our dual system of government.

It is respectfully submitted, therefore, that the construction of each provision of the Act is of the utmost importance, and calls for the supervisory powers of this Court. (Printed copy of the Act as amended, has been supplied as Appendix A to this brief.)

POINT B.

The decisions of the Circuit Court of Appeals are in conflict with the applicable decisions of this Court in the following respects:

First: It is at once apparent from a reading of the Securities Act of 1933, as amended, that it does not regulate the use of the mails, nor does it regulate interstate commerce among the States and with foreign nations, but it does, in its operation and effect, regulate the issuance and the sale and the purchase of securities under the guise of regulating the mails and interstate commerce, which is a prohibited exercise of power by the National Government, in violation of the 10th Amendment to the Federal Constitution.

Brooks v. *United States,* 267 U. S. 432, 45 S. Ct. 345;

Hammer v. *Dagenhart,* 247 U. S. 251, 38 S. Ct. 529.

Second: The Securities Exchange Act of 1933, as amended, does not deal with *things* mailed, but with the action and conduct of persons using the mails; and "any legislation excluding from the mails must apply directly to the *things* mailed, not the persons using the mails." (Rogers' "The Postal Power of Congress", Johns Hopkins Press, Series XXXIV, No. 2, page 172.)

See *Ex Parte Jackson,* 96 U. S. 727.

Third: Trust Certificates, such as are covered by petitioner's registration statement in the case at bar, are not commodities in the sense that they may be the subject of commerce among the States or with foreign nations.

Insurance policies and contracts are not commodities which may be the subject of interstate commerce.

Paul v. *Virginia,* 8 Wallace 168;
Dukat v. *Chicago,* 10 Wallace 410;
Liverpool Ins. Co. v. *Massachusetts,* 10 Wallace 56;
Philadelphia Fire Assoc. v. *New York,* 119 U. S. 110;
Hooper v. *California,* 155 U. S. 648;
Noble v. *Mitchell,* 164 U. S. 367;
New York Life Ins. Co. v. *Cravens,* 178 U. S. 389;
Nutting v. *Massachusetts,* 183 U. S. 553;
New York Life Ins. Co. v. *Deer Lodge County,* 231 U. S. 495.

A broker who uses the mails in buying and selling foreign bills of exchange is not engaged in interstate commerce, but in supplying an instrument of commerce.

Nathan v. *Louisiana,* 8 Howard 73.

A Massachusetts Trust doing a business of buying and selling negotiable notes in various States, was held not to be engaged in interstate commerce.

Hemphill v. *Orloff,* 277 U. S. 537;
See *Graniteville Manufacturing Co.* v. *Query,* 44 F. (2d) 64.

Fourth: The authority of the Securities and Exchange Commission to make the three orders which it

did make denying the petitioner the right to withdraw and dismiss his registration statement, if done under Release No. 47, requires, in order that such orders shall be effective, a determination of facts which will clearly set forth that to permit dismissal and withdrawal would affect adversely and injuriously the public interest, and would fail to protect investors.

Panama Refining Co. v. *Ryan,* 293 U. S. 388;
Wichita Railroad & Lt. Co. v. *Public Utilities Commission,* 240 U. S. 48, 59;
Schechter Poultry Corp. v. *United States,* 55 S. Ct. 837.

Fifth: Under the authorities cited under the preceding paragraph, in order to give to Release No. 47 validity, the determinations of fact upon which it was bottomed would have to be recited in the order. Such findings are not there.

Sixth: Section 19(a) of the Securities Act of 1933 provides that "the rules and regulations of the Commission shall be effective upon publication in the manner in which the Commission shall prescribe". The Commission has prescribed no manner in which its rules and regulations shall be effective, hence it would appear that for another reason the Circuit Court of Appeals erred in holding that Release No. 47 is valid, and the holding is contrary to the elementary rule that a commission which is the creature of a statute must draw its power from the statute.

Seventh: The right of a plaintiff to dismiss a lawsuit which he has filed, in the absence of statutory inhibitions or court rules to the contrary, is absolute, and when the Securities and Exchange Commission denied the petitioner his right to dismiss his regis-

tration statement, it deprived him of the right without due process of law.

Cybur Lumber Co. v. *Erkhart,* 247 Fed. 284;
Barrett v. *Virginia R. R. Co.,* 250 U. S. 473;
Ex parte Skinner & Eddy Corp., 265 U. S. 87.

POINT C.

The Court will quickly perceive, from a casual review of the record, that the matters involved in this case are of great public importance, because unless a registration statement has been filed with the respondent and is in effect as to a security, it is unlawful for any person, directly or indirectly, (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails, to sell or offer to buy such securities through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purchase or sale or for delivery after sale; and it is unlawful for any person, directly or indirectly, (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails, to carry or transmit any prospectus relating to any security registered under the Act, unless such prospectus meets the requirements of Section 10 thereof; or (2) to carry or cause to be carried, through the mails or in interstate commerce, any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Section 10 (Section 5, Securities Act of 1933).

A review of Sections 6, 7, 8, 10, 11, 12, 15, 17, 19, 23 and 24 and Schedule A of the Securities Act of 1933 will impress upon the Court the unusual requirements, restric-

tions, penalties and exactions imposed upon individuals, firms and corporations who are engaged in the business of issuing, buying and selling securities, and which so supervises and controls in detail their everyday business affairs as to forcibly impress upon one's mind the proposition that the Congress, by the Act, is not regulating interstate commerce or the use of the mails, but is usurping the power of the states, in violation of the 10th Amendment to the Federal Constitution, and a review and determination of the matter by this Court, in the interest of the public, is required.

If this Court should find that the Securities Act of 1933, as amended, is within the constitutional power of the Congress, still the interpretation placed upon the Act by the respondent, to the effect that a registrant, once he has filed a registration statement with the respondent, may not voluntarily withdraw it if, as in this case, he asks that he be permitted to do, before any of the proposed issue of securities had been sold to the public, or the rights of the public or underwriters have attached thereto, so that they would not be adversely affected by the withdrawal, is so far-reaching and so contrary to the well established principles of American jurisprudence, that the interest of the public requires that the matter be reviewed and proper directions given by this Court.

In this argument we are fully supported by the decisions of this Court in the following cases:

Montana Mining Co. v. *St. Louis Mining & Milling Co. of Montana,* 204 U. S. 204; 27 S. Ct. 254;

International Railway Co. v. *Davidson,* 257 U. S. 506, 42 S. Ct. 179.

We believe it unnecessary, for the purposes of this petition, to argue the detailed specification of errors assigned in paragraph IV under Section B of the petitioner's appli-

cation, as we believe that our arguments under Points A, B and C, of the Brief, sufficiently establish this Court's jurisdiction of the case and the importance of and necessity for the granting of the writ.

Conclusion.

It is therefore respectfully submitted, that this case is one calling for the exercise by this Court of its supervisory power, in order that the petitioner may have the relief which was denied by the District Court and by the Circuit Court of Appeals, and that to such end writs of certiorari should be granted that this Court may review and thereafter reverse the decisions of the United States Circuit Court of Appeals.

Respectfully submitted,

JAMES M. BECK,
BAINBRIDGE COLBY,
HARRY O. GLASSER,
J. N. SAYE,
H. I. FISCHBACH,
Counsel for Petitioner.

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No. 640

In the

Supreme Court of the United States.

October Term, 1935.

J. EDWARD JONES, *Petitioner,*

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

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Washington, D. C.,
BAINBRIDGE COLBY,
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HARRY O. GLASSER,
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Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 640

J. EDWARD JONES, *Petitioner,*

vs.

SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

BRIEF *for* PETITIONER.

(a) Opinion of Court Below.

(Nov. 4, 1935), 79 F. (2d) 617. Which opinion, being brief (R. 119-125, inc.), is printed as Appendix "A" hereto, pp. 74-80.

(b) Statement Upon Which Jurisdiction of This Court Is Invoked.

The jurisdiction of the Supreme Court is invoked under section 240 of the Judicial Code, as amended by the Act of February 13, 1925, and Supreme Court Rule No. 38.

(c) Statement of the Case.

The petitioner is a citizen of the State of New York, with his principal place of business at 342 Madison Avenue, City, County and State of New York.

The respondent is an administrative tribunal organized

and existing under and by virtue of section 4 of the Securities Exchange Act of 1934 (48 Stat. 885, 15 U. S. C. A. 78d).

On May 4, 1935, the petitioner filed with the respondent, a registration statement upon a proposed issue of participation trust certificates of proportionate ownerships in producing oil wells, for a total authorization of 1,000 certificates at the aggregate offering price of One Hundred Thousand Dollars ($100,000.00), pursuant to section 6(a) of the Securities Act of 1933 (15 U. S. C. A. 77f). (R. 33-89, inc.) Said registration statement, if action had not been taken with regard thereto by the respondent, would have become effective the twentieth day after the filing thereof. (Section 8(a), Securities Act of 1933; 15 U. S. C. A. 77h(a), a copy of which act for convenience in reference, being inserted herein between pages 80 and 81 as Appendix "B".)

However, on May 23, 1935, the day before said registration statement would have become effective, the respondent sent a telegram to the petitioner (R. 89-90), in which it was stated (in substance), that it appeared to the respondent that said registration statement included untrue statements of material facts and omitted to state material facts required to be stated therein and material facts necessary to make the statements therein not misleading. The petitioner was also informed that a hearing upon the matter would be held at the office of the respondent in Washington, D. C., at 10 A. M., Thursday, June 6, 1935, at which time and place the petitioner might appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement.

The hearing was continued until June 18, 1935. On June 13, 1935, George C. Matthews, one of the Commis-

sioners, issued a subpoena *duces tecum* (R. 90-91) commanding the petitioner to appear before William Green (a member of the legal staff), then acting as an officer of the Securities and Exchange Commission, at the office of the Commission in Washington, D. C., on the 18th day of June, 1935, at 10 o'clock A. M., of that date, to testify with reference to his registration statement and to bring with him certain books and records specified in the subpoena. The petitioner appeared at the hearing on June 18th, 1935, by counsel, who formally withdrew petitioner's registration statement and tendered a written statement by petitioner, copy of which is annexed hereto as Appendix "C," pp. 81-83. The examiner denied the right to withdraw the registration statement, and proceeded with the hearing, the full transcript of which is printed in the record in case No. 639, and the material portions of which are reproduced in Appendix "D" hereto, pp. 83-87. The hearing not having been concluded on June 18th, was adjourned until June 27, 1935.

On June 18th, 1935, William Green, acting as an officer of the respondent, issued a subpoena (R. 96) to the petitioner, requiring him to appear before said officer at the office of the respondent in Washington, D. C., on the 27th day of June, 1935, to testify in the matter of the hearing on the registration statement of the petitioner.

The petitioner refused to obey this subpoena in person.

His counsel, however, entered a special appearance at said hearing and presented to the presiding officer four (4) documents (duly verified in the manner provided by law); namely,

(a) dismissal (R. 96-97),

(b) motion to dismiss (R. 97-98),

(c) motion to quash subpoena (R. 98-99),

and,

(d) objection to jurisdiction. (R. 100-101).

Copies of said documents were duly tendered to and received by counsel for the Commission, and were submitted to the examiner who, over the objection of counsel for the Commission, sustained the right of the petitioner as a registrant to present such documents.

Thereupon each document was formally presented by petitioner's counsel and overruled and denied by the examiner (proceedings of June 27th, 1935, R., case No. 639, pages 157-164, the material portions of which are reprinted as Appendix "E" hereto, pp. 88-96).

Appropriate exceptions were noted in the record, and petitioner's counsel again withdrew from the proceedings.

The Securities Act of 1933, before the amendment of 1934, was administered by the Federal Trade Commission (Title 1, Securities Act of 1933, sub-section 5 of section 2, 15 U. S. C. A. 77b(5)). By the amendment of June 6, 1934, the duties of the Federal Trade Commission were transferred to the Securities and Exchange Commission, and all orders, rules and regulations which had been issued by the Federal Trade Commission under the Securities Act of 1933 were continued in full force and effect until superseded, revoked or repealed by the Securities and Exchange Commission. (June 6, 1934, c. 404, section 210, 48 Stat. 908; 15 U. S. C. A. 78ii.) The respondent, in issuing the aforesaid orders, relied as its authority upon a *rule,* termed Release No. 47 (Appendix "H" hereto, pp. 105-110), which had been promulgated and issued by the Federal Trade Com-

mission. That part of Release No. 47 which is pertinent to the issues herein involved, reads:

> "Any registration statement or amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. * * * Such consent shall be given by the Commission with due regard to the public interest and the protection of investors."

Being aggrieved by the aforesaid orders of the respondent, the petitioner, pursuant to section 9(a) of the Securities Act of 1933 (13 U. S. C. A. 77i(a)), filed a petition in the United States Circuit Court of Appeals for the Second Circuit, praying for a review thereof (R. 29), upon the denial of which this court refused to grant *certiorari*.

Stay order not having been issued by the Circuit Court of Appeals when the petition for review was filed in that court, the respondent proceeded under sub-section (b) of section 9 of the Securities Act (15 U. S. C. A. 77i(b)).

After the petitioner had filed his petition for review in the Circuit Court of Appeals, the respondent pursuant to section 22(b) of the Securities Act of 1935 (15 U. S. C. A. 77v(b)), on July 3, 1935, filed an application in the District Court of the United States for the Southern District of New York for an order requiring the petitioner to appear before William Green, an officer of the Securities and Exchange Commission, there to give evidence in the hearing and examination entitled, in the matter of the registration statement of J. Edward Jones, File 2-1408-1. (R. 2-15, inc.)

In response to a rule to show cause why the respondent's application should not be granted by the District Court, the petitioner appeared in that court and challenged:

(a) The jurisdiction of the court to require obedience to the subpoena of the respondent, because of the proceedings pending in the Circuit Court of Appeals to review the act of the respondent in denying the petitioner the right to withdraw his registration statement (R. 27, 28);

(b) the authority of the respondent to issue a subpoena to compel petitioner's attendance (R. 22 and 26);

(c) the validity of the orders of the respondent denying the right to withdraw his registration statement and in overruling his various motions to withdraw and dismiss the proceedings before the respondent, and in refusing to quash the subpoena issued by the respondent and served upon petitioner (R. 25-26);

(d) the validity of the Federal Trade Commission's Release No. 47, was further challenged in the argument below as *(1)* being unauthorized by the Securities Act of 1933, and, *(2)* because it had not been published as required by section 19(a) of the act (15 U. S. C. A. 77s), and *(3)* because the release failed to include findings of fact to show that such rule was (or is) necessary to carry out the provisions of the Act; and,

(e) the validity of the respondent's orders denying the petitioner's motions to dismiss and withdraw his registration statement was likewise there challenged for the failure to support such orders by the necessary findings of fact, which would bring them within an exception to that part of Release No. 47 which requires that the respondent's consent to an application to withdraw a registration statement shall be given with due regard to the public interest and the protection of investors;

(f) the validity of the Securities Act of 1933, as amended, because:

(1) it is an unlawful attempt upon the part of Congress to delegate its powers to respondent;

(2) it is an attempt upon the part of the Congress to regulate the purchase and sale of securities and the acts and conduct of those engaged in that business, in violation of the 10th Amendment to the Federal Constitution (R. 23);

and,

(3) the act, as construed and applied by the respondent, violates the 4th and 5th Amendments to the Federal Constitution. (R. 23)

The District Court overruled all of the aforesaid contentions of the petitioner, held Release No. 47 to be authorized by the Securities Act, that it had been properly promulgated and issued by the respondent, and was a valid rule; that the respondent was authorized, under the act and under said rule, to deny petitioner's motions to dismiss his registration statement, and held that the Securities Act was a proper exercise of congressional authority under article 1, section 8, of the Federal Constitution, which confers upon the Congress power *(1)* to regulate commerce with foreign nations and among the several states, and *(2)* to establish post offices and post roads, and ordered the petitioner to obey the respondent's subpoena.

The petitioner duly prosecuted an appeal from the order of the District Court to the Circuit Court of Appeals for the Second Circuit. That court consolidated the argument upon the petition for review and the case on appeal.

The Circuit Court of Appeals dismissed the petition for review on the ground that the orders of the respond-

ent denying the petitioner's motions to dismiss and withdraw his registration statement and to quash the subpoena served upon him were not orders which the petitioner was entitled to have reviewed by that court under section 9(a) of the Securities Act (15 U. S. C. A. 77i(a)); *certiorari* to review this judgment was denied by this court. In the case instituted in the District Court by the Commission, the Circuit Court of Appeals upheld the validity of Release No. 47 and the orders of the respondent denying the various motions of the petitioner to withdraw and dismiss his registration statement, the order refusing to quash the subpoena served upon him, and upheld the Securities Act as a valid exercise of power by the Congress under article 1, section 8, of the Federal Constitution, which confers upon the Congress the power to establish post offices and post roads. The Circuit Court of Appeals pretermitted a decision upon the question as to whether or not the Securities Exchange Act could be sustained under the commerce clause of the Federal Constitution as being unnecessary to a determination of the case, and affirmed the order of the lower court directing the petitioner to appear before the Commission and testify in accordance with its subpoena.

A petition for rehearing thereon was duly filed in the Circuit Court of Appeals and denied. (R., case No. 640, 126)

Certiorari was granted February 3rd, 1936.
—*Advance Opinions*, Vol. 80, L. ed. 423. (R. 129)

(d) Specification of Assignment of Errors.

For errors relied upon by petitioner, see Appendix "F," pages 96-102.

ARGUMENT.

I.

The Constitutional Question.

At the outset, we submit that notwithstanding the recitation of the enacting clause of the Securities Act of 1933, that its purpose is,

> "* * * to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails and *to prevent frauds* in the sale thereof and for other purposes,"

in operation it does nothing of the kind.

If the *truth* be told in the registration statement, and printed in the balance-sheet in the prospectus, it matters not how *fraudulent* or *worthless* the security may be, it may go into interstate commerce and the mails.

Upon the contrary, the most valuable security on the market may not be permitted in interstate commerce or the mails, if the issuer has

(a) failed or refused to register his security,

or,

(b) in registering, has

(*1*) omitted to state a material fact,

or,

(*2*) misstated a material fact.

The effect of such regulation is not to prevent fraud, but to induce it, and the enforcement of the act will but destroy the common law right of recovery for actionable fraud upon *any registered security,* no matter how worthless it may prove to be, or how erroneous the judgment of the

Commission may have been in determining that the *truth* had been told in the registration statement.

The situation in fact is made doubly misleading to the public, in that while the Commission by its rules and action pretends to get at the truth of the representations contained in the registration statement, it protests that it does not and *will not pass on values* or determine whether securities are good or bad.

How can fraud be prevented unless it does so?

To tell the truth about a fraudulent security, and thus immunize it in interstate commerce and the mails, would be about as helpful to the public as raising the quarantine upon the leper, merely because he states that he is a leper.

We quote from the Yale Law Journal, December, 1933, Vol. XLIII, page 171, No. 2, as follows:

> "The Securities Act though probably one of the most spectacular types of legislation, is of secondary importance in a comprehensive program of social control over finance. Some, however, have believed, apparently in all sincerity that the great drop in security values in the last five years was the result of failure to tell the 'truth about securities.' And others have thought that with the Securities Act it would be possible to prevent a recurrence of the scandals which have brought many financiers into disrepute in recent years. As a matter of fact there are but few of the transactions investigated by the Senate Committee on Banking and Currency which the Securities Act would have controlled. There is nothing in the Act which would control the speculative craze of the American public, *or which would eliminate wholly unsound capital structures.* There is nothing in the Act which would prevent a tyrannical management from playing wide and loose with scattered minorities, or which would prevent a

new pyramiding of holding companies violative of the public interest and all canons of sound finance. *All the Act pretends to do is to require the 'truth about securities' at the time of issue, and to impose a penalty for failure to tell the truth. Once it is told, the matter is left to the investor.*

"But even the whole truth cannot be told in such simple and direct terms as to make investors discriminating. A slow educational process must precede that. Those who need investment guidance will receive small comfort from the balance sheets, statistics, contracts, and details which the prospectus reveals.

"At the present time one could not expect more far reaching effects. The economy under which we live is not static. Industry is not stabilized and under our present methods never can be. Competition and the progress of invention make it inevitable that many enterprises will fail. The toll of technology over a period of years is enormous. And the downward turn of the business cycle may eliminate more than just the marginal enterprise. Other factors of management, not related to cupidity and fraud, contribute to the same end. As a result, a substantial percentage of industrial investment will in any event be lost. To speak then of underwriting the values which are based on such unstable foundations is sheer nonsense. And to expect that the judgment of investors as respects these imponderable factors will improve perceptibly in this generation is baseless optimism.

"This is reason enough why the state should not pronounce investments sound or unsound. To the business community it seems likewise sufficient reason for tempering and moderating the liabilities of those responsible for the issue. For, it is said that when security values shrink as they have in the last few years it is but natural to find blame laid at the door of those who got the money, who were identified with the flotation, or who were connected with the management. In

that connection it is also urged that risks should not be placed so high as to deter substantial and honest men from engaging in legitimate business."

In urging upon the Congress the enactment into law of the legislation complained of, the President on March 29th, 1933, in a special message (H. R. Rep. No. 85, 73rd Congress, 1st Session, p. 1), said:

"* * * let the seller also beware * * *."

The law itself, however, does not reach the goal, and changes the rule. The abuses of sales technique continue to prevail to the detriment of the investing public, because the law does not insure the investor a *quid pro quo* for what he parts with.

The exaction of money from the gullible is facilitated by the mass of intricacies in the prospectus authorized by the registration of securities.

No longer does the rule of fair value obtain.

The test ordained by this legislation is—did the vendor state the facts in the registration statement? If the answer is in the affirmative, the vendor is beyond the process of the law, regardless of how little value may have been in the security or how great the fraud actually practiced in its sale.

Manifestly, the act regulates and permits the regulation of the conduct of the citizen, before any security is offered for transportation in any of the instrumentalities of commerce or through the United States mails, which is an

"* * * exercise of police power not delegated to the United States by the Constitution nor prohibited by it to the states,"

but specifically by the Tenth Amendment,

> "* * * reserved to the states respectively, or to the people."

If authority be in the Congress to enact the complained of legislation, it must be found in

(a) the Commerce clause of the Constitution (subdivision 3 of section 8, of Art. I thereof);

or,

(b) in the authority to establish post offices and post roads (subdivision 7 of Sec. 8 of Art. I thereof);

and the constitutionality of the act will be considered under these respective subdivisions:

(a) *The Commerce Clause.*

Commissioner Landis (Chairman of the Commission) in testimony before the House Committee on interstate commerce, stated that,

> "I speak primarily of the interstate commerce power, because *I do not believe* that legislation *of this type* (the regulation of the Stock Exchange) can be based effectively upon any other power than the congressional power over interstate commerce."

Manifestly the purchase and sale in New York of units of ownership in "oil royalties" in Oklahoma must be made *interstate commerce,* if the act is to be held valid under the commerce clause.

The right of the owner of lands permeated by oil and gas, to drill wells and reduce these products to possession, is an *incorporeal hereditament* and the proper subject of sale, and may be granted or reserved, and a lease conferring the right for a specified time to *mine and operate*

upon the lessor's premises for oil and gas, grants to the lessee a present *vested interest in the land.*

—*Rich* v. *Doneghey,* 71 Okl. 204, 177 Pac. 86, 3 A. L. R. 352;

Alexander v. *King,* 46 F. (2d) 235 (10th Cir.);

Priddy v. *Thompson,* 204 Fed. 955 (8th Cir.);

Kolachny v. *Galbreath,* 26 Okl. 772, 110 Pac. 902.

The conclusion that a mineral right is

"an incorporeal hereditament,"

requires that an interest therein (in Oklahoma) within the provisions of the laws of that state, must be recorded as a part of the realty, and documents evidencing subsequent conveyances with regard thereto must likewise be subsequently recorded in advance of change of record ownership.

Such requirement precludes a definition of "security" in such transactions, and if the act be held valid in respect to other matters, it clearly is invalid as a pretended regulation of oil royalty sales upon lands in Oklahoma which are dealings in real property in that state.

We quote from Oklahoma Statutes 1931, section 9661:

> "No deed, mortgage or other conveyance relating to real estate *or any interest therein,* other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; * * *"

also from section 9672:

> "Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument *relating to real estate,* other than a lease for a period *not exceed-*

ing one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided.";

and from section 9673:

"Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers, or creditors."

Section 5 of the act defines "interstate communication" to be "interstate commerce." Such of course is not the law.

In *U. S. Fidelity Co.* v. *Ky.*, 231 U. S. 394, 58 L. ed. 383, in which the constitutionality of a Kentucky license tax upon a commercial agency was upheld, the court said:

"The circumstance that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise from state to state, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, *is not controlling.*

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. *Ficklen* v. *Taxing Dist.*, 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. Or the business of the live stock exchange that was under consideration in *Hopkins* v. *United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031.

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

In the brief in the United States Circuit Court of Appeals, counsel for the Commission at page 49 thereof state, that:

"Not only are the securities themselves the subjects of interstate commerce, *but a long line of cases* has established that mere interstate communication is subject to regulation by Congress under the commerce clause."

Citing:

Western Union Telegraph Co. v. *Foster,* 247 U. S. 105, 62 L. ed. 1015.

In that case an order of the Massachusetts Public Service Commission recited that the Gold & Stock Telegraph Company by the Western Union lessee and the United Telegram Company, had without just cause, refused to supply to Calvin H. Foster, the continuous quotations of the New York Stock Exchange, by means of ticker service then supplied to others, declared the refusal an unlawful discrimination and required the two companies to remove the discrimination forthwith.

We quote from the opinion:

"The material facts may be abridged as follows: The New York Stock Exchange, having a monopoly of the information collected by it on the floor of the Exchange concerning the prices quoted in transactions there, made contracts with the plaintiffs in error of the same general character as those before the court in *Board of Trade* v. *Christie Grain & Stock Co.,* 198

U. S. 236, 246, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637, and *Hunt* v. *New York Cotton Exch.*, 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529. By these contracts for specified lump sums the Exchange agreed to furnish to the telegraph companies simultaneously full and continuous quotations of prices made in transactions upon the Exchange. The telegraph companies 'may' in their turn furnish quotations to their 'patrons' at intervals of more than fifteen minutes, subject to discontinuance upon objection of the Exchange, and may furnish continuous service by ticker to subscribers, provided the latter sign applications in duplicate, one of which is to go to the Exchange, the application not to be effectual until the subscriber is approved by the Exchange, agreeing that the telegraph company may discontinue the service 'whenever directed so to do by said New York Stock Exchange.' The application recognizes that the quotations are furnished under contract with the Exchange, and agrees not to furnish the quotations to branch offices or correspondents unless first approved by the Exchange and also signing agreements, one of which is to be delivered to the Exchange. The contract states that the intent of the Exchange in reserving the right to disapprove, etc., is only to prevent improper and unlawful use of the facts.

"The Gold & Stock Telegraph Company's business is carried on by the Western Union Telegraph Company in the name of the former. The quotations are furnished to the latter in New York, telegraphed by it to the office of the Gold & Stock Company in Boston, translated from the Morse code into English and thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegram Company, a New Jersey corporation, receives quotations for Boston alone, where is its principal office outside of New Jersey. They are furnished by the Exchange in New York, telegraphed to the Boston office over a wire of the Postal Telegraph Cable Company, and thence transmitted as

in the other case. On these facts the plaintiffs in error say that the order is an unwarranted interference with commerce among the states and takes property without due process of law, setting up the Constitution of the United States.

"• • • *It is admitted* that the transmission from New York to Massachusetts by the telegraph company *was interstate commerce.*"

If so, it continued such, until it reached

"• • • the point where the parties originally intended that the movement should finally end.' *Illinois C. R. Co.* v. *De Fuentes,* 236 U. S. 157, 163, 59 L. ed. 517, 519, P. U. R. 1915A, 840, 35 Sup. Ct. Rep. 275.

"If the transmission of the quotations is interstate commerce, the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error, under their present charters, could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end (*United States* v. *Reading Co.* 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90), and a constitutional power cannot be used by way of condition to attain an unconstitutional result (*Western U. Teleg. Co.* v. *Kansas,* 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57)."

From the foregoing quotations from the opinion, it will be readily observed that the case is not in point. It was admitted that the *quotations were being carried in interstate commerce* and an attempted interference by the State of Massachusetts with the facilities of the Western Union Telegraph Company in its delivery of the New York stock quotations to its customers, in Boston, was an unwarranted and illegal act upon the part of the state.

It is needless to observe that the quotations before delivery to the Western Union were exclusively within the control of the New York Stock Exchange, and were necessary to and form a vital part of interstate business with relation to the commodities sold upon the exchange.

There could be no disagreement in the *Western Union* case, as to the interstate character of the delivery of the quotations in Boston to the customers of the Western Union Company by that company, and a contrary contention was not made by the State of Massachusetts. The state did contend that after the quotations had reached Boston and were broken up for personal delivery as the contents of the package shipped in interstate commerce may be broken for local delivery, the interstate nature of the shipment was thereupon destroyed, and that in the delivery of the quotations within the City of Boston the control thereof was intrastate and within Massachusetts.

Mr. Justice HOLMES' decision to the contrary, is sound, but it is not here in point.

It is then said, by counsel for the Commission, that,

"* * * the regulation of radio broadcasting and receiv-

ing stations has been judicially upheld on the same theory."

Citing:

Federal Radio Comm. v. *Nelson Bros.*, 289 U. S. 266, 77 L. ed. 1177.

An examination of that decision will disclose that the material reference to interstate commerce in the opinion is contained in the following quotation:

"• • • This court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400, 401, 51 L. ed. 523, 539, 27 S. Ct. 367; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634, 638, 56 L. ed. 570, 582, 584, 32 S. Ct. 340; *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614, 56 L. ed. 911, 916, 917, 32 S. Ct. 589, 1 N. C. C. A. 892; *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 260, 59 L. ed. 939, 944, 35 S. Ct. 565; *Continental Ins. Co.* v. *United States*, 259 U. S. 156, 171, 66 L. ed. 871, 884, 42 S. Ct. 540; *Sproles* v. *Binford*, 286 U. S. 374, 390, 391, 76 L. ed. 1167, 1180, 52 S. Ct. 581; *Stephenson* v. *Binford*, 287 U. S. 251, 276, *ante*, 288, 301, 53 S. Ct. 181, 87 A. L. R. 721; *New York* v. *Federal Radio Commission*, (D. C.) 36 F. (2d) 115, 281 U. S. 729, 74 L. ed. 1146, 50 S. Ct. 246; *American Bond & Mortg. Co.* v. *United States*, (C. C. A. 7th) 52 F. (2d) 318, 285 U. S. 538, 76 L. ed. 931, 52 S. Ct. 311; *Trinity Methodist Church, South*, v. *Federal Radio Commission*, 61 App. D. C. 311, 62 F. (2d) 850, 288 U. S. 599, *ante*, 975, 53 S. Ct. 317."

That decision does not support the Commission's position.

In *International Text-book Co.* v. *Pigg*, 217 U. S. 91, 54 L. ed. 685, also cited by the Commission, there was involved the validity of a Kansas statute requiring foreign corporations before instituting any suit in the courts of the State of Kansas, to comply with certain provisions of the Kansas statute with regard to the filing (with the Secretary of that state) a complete detailed statement of the financial condition of such corporation on the 30th day of June next preceding. The validity of the statute turned upon the question of whether it imposed a burden upon interstate commerce.

We quote from the decision:

"It is true that the business in which the International Text-book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this *mode of imparting and acquiring an education may not be such as is commonly adopted in this country*, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-book Company and its scholars—*involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study* the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. *Intercourse of that kind, between parties in different states*—particularly

> when it is in execution of a valid contract between them—*is as much intercourse in the constitutional sense, as intercourse by means of the telegraph*—'a new species of commerce,' to use the words of this court in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.*, 96 U. S. 1, 9, 24 L. ed. 708, 710.
>
> "* * * In our further consideration of this case, we shall therefore assume that the business of the Text-book Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

The background of every case involving a constitutional question, must necessarily have considerable bearing upon its ultimate determination, and such was the case in *International Text-book Company* v. *Pigg, supra.* Intercourse of the kind there detailed, could not have been held to be otherwise than interstate, but the court did not intend to intimate that the Federal Government might go to Scranton, Pennsylvania, to examine into the truth of the claims of the International Text-book Company, as *to the truth of the teachings in its publications,* as a condition precedent to the *books being shipped into Kansas.*

The petitioner is prepared to admit, that if the act in question kept fraudulent securities out of commerce and the mails, and was a regulation of the thing in commerce, rather than a policing of the conduct of citizens before a tender in commerce, or the mails, has been made, a quite different question would be presented.

Will it be thought that the salesman of the lottery ticket might ship the same in commerce or through the mails, by making a full and truthful disclosure as to just what the ticket is, or may the thief secure immunity by filing a *caveat* in the county of the state in which he proposes to

steal an automobile that upon a certain day he will do so? Certainly not; and no case has heretofore held, or has it been supposed that the conduct of the shipper prior to shipment could, or would, have anything to do with an otherwise contraband shipment, or that *wrongful* conduct when supervised by the Federal Government will be in the general welfare.

Such regulation is not of *commerce;* it is of *conduct* which may not in fact ever result in commerce of any kind.

How can Congress, under the commerce clause, regulate commerce that has not yet come into existence?

In further support of the Commission's position, counsel cited:

Compton v. *Allen,* 216 Fed. 537;

Bracey v. *Darst,* 218 Fed. 482;

and,

Alabama & N. O. Transp. Co. v. *Doyle,* 210 Fed. 173;

and promptly admit (brief, Circuit Court of Appeals, page 47) that,

> "* * * to the extent that these cases hold state blue-sky laws invalid under the commerce clause, they are *probably inconsistent* with the *later* decisions of the Supreme Court in *Hall* v. *Geiger-Jones Co.,*" 242 U. S. 539, 61 L. ed. 481.

Such admission carries the citations indicated out of the discussion, for the evident reason that a determination of a burden upon interstate commerce was erroneously made to reach a further erroneous conclusion which is admitted by counsel.

After having made such admission, it is then argued that the Supreme Court in *Hall* v. *Geiger-Jones Co., supra.,*

"* * * recognized that securities are articles of commerce."

Let us see if this is so.

Justice McKenna there said:

> "The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (Secs. 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the state. Upon their transportation into the state there is no impediment—no regulation of them or interference with them after they get there. There is the restriction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, *if they may be regarded as such. It is a police regulation strictly,* not affecting them, until there is an attempt to make disposition of them within the state. To give them more immunity than this, is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally." (Citing cases.)

The entire quoted comment by Justice McKenna is predicated upon the conclusion that the requirements of the statute, at most, but imposed an *indirect burden* upon interstate commerce, *if* securities which might be transported into the state

"* * * may be regarded as * * *"

objects of interstate commerce.

Such statement does not determine that *securities* shipped into the state are objects of commerce, and it was not necessary to so determine, inasmuch as the decision squarely turned upon the approval of an exercise of the state's police power, which but emphasizes the petitioner's contention that what the Federal Government is now seeking to do through the Securities Commission, is exactly what Justice McKenna, by clear inference, held the state might *exclusively* do.

The approval of the Securities Act by this court will involve the conclusion that the opinion in *Hall* v. *Geiger-Jones, supra,* was ill-advised and that the act of the state there reviewed, must now be thought to have been an invasion of the federal sovereignty.

It must be certain that the authority to so legislate cannot be delegated to the Federal Government under the commerce clause, and at the same time be reserved to the states under the Tenth Amendment. Such is the effect of the Commission's position and contention.

Justice McKenna in effect said, that if *securities* are in interstate commerce, they are not sufficiently so, to make a state statute unconstitutional which regulated the conduct of one dealing therein in such state.

Manifestly, *Hall* v. *Geiger-Jones, supra,* is in petitioner's favor.

We think counsel for the Commission misconceive the basis of congressional control over interstate commerce, as distinguished from its control over the instrumentalities of commerce such as railroads, telegraph, telephone, etc., which arises from the power which the federal government possesses *to insure the free movement of commodities,* or

subjects of such commerce, between the states. To this extent direct and substantial interference by the states is prohibited.

These principles have found application in the Packers and Stock Yards Act and the Grain Futures Act, the constitutionality of which have been upheld, and in which federal control was exercised over certain practices on live stock and grain exchanges. The transactions made the subject of federal regulation by these acts were not themselves regarded as interstate commerce, although the live stock or grain to which they related necessarily moved in interstate commerce. In fact, this court has repeatedly held that transactions upon commodity exchanges do not constitute interstate commerce. *Hopkins* v. *United States,* 171 U. S. 578; *Hill* v. *Wallace,* 259 U. S. 44; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593. It is the effect of such transactions upon the *stream of commodities* moving in interstate commerce that makes them subject to federal regulation. *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *Stafford* v. *Wallace,* 258 U. S. 495; *Board of Trade* v. *Olsen,* 262 U. S. 1; *United States* v. *Coffee Exchange,* 263 U. S. 611; *Tagg Bros. and Marshall* v. *United States,* 280 U. S. 520. This is made manifest by the statement of Chief Justice TAFT in *Board of Trade* v. *Olsen, supra,* when he said:

> "The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East."

In the foregoing cases Congress undertook the regulation of transactions in commodities raised or produced with the *expectation* that they would move through instruments of commerce, the railroads, and become a part of the flow of such commerce between the states. Consumption of such commodities within the state of their origins, except to a very limited extent would be impossible. Their production, marketing and sale to the ultimate consumer necessarily constitutes an interstate business. It is constant in its relation to the law of supply and demand and any interruption of that relationship through transactions of the character prohibited by the acts referred to, would necessarily constitute an interruption of and burden upon interstate commerce. The transportation and terminal facilities of the railroads are likewise dependent upon continuity in the flow of such commodities in interstate commerce.

None of these conditions obtains in respect to the business of buying and selling securities. There are no circumstances *requiring* securities to move from state to state in order to be dealt with. They may find a ready market on exchanges, or in over-the-counter trading, in the state of their issue. Nor are the facilities of the railroads in any sense dependent upon the movement of securities between the states.

In *Hopkins* v. *United States*, 171 U. S. 578, transactions on the Kansas City Live Stock Exchange, an unincorporated association, having to do with the purchase and sale of cattle, hogs and other live stock, were held not interstate, the court saying:

> *"The selling of an article at its destination, which has been sent from another state, while it may be re-*

garded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce." (Italics supplied.)

In *Hatch* v. *Reardon*, 204 U. S. 152, an act of the State of New York imposing a stamp tax of two cents on the $100 of face value of shares of stock, when sold in New York by a resident of Connecticut to a resident of the latter state doing business in New York, was held not a burden on interstate commerce, the court saying:

> "The fact that the property sold is outside of the state and the seller and buyer foreigners are not enough to make *a sale* commerce with foreign nations or among the several states, and *that is all that there is here.*"

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, a statute of Alabama imposing a license tax on stock and cotton exchanges and the persons trading thereon for the purpose of buying and selling futures, was held not a regulation of interstate commerce although such purchases or sales were executed through the medium of an agent in Mobile, Alabama, on the New York or New Orleans Cotton Exchanges. The court said:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual de-

livery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, *as result in actual delivery of the grain or cotton,* the stipulated facts show that when the orders transmitted are received in the foreign state the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, *that was not because of any contractual obligation so to do.* In neither class of contracts, for sale or purchase, *was there necessarily* any movement of commodities in interstate traffic, because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obligating an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.*" (Italics supplied.)

In *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, it was said:

"The New York Exchange is engaged in a local business. Transactions between its members are purely

local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be delivered from such warehouse. *Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another.* If interstate shipments are actually made, *it is not because of any contractual obligation to that effect;* but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412-413. The most that can be said is that the agreements are likely to give rise to interstate shipments. *This is not enough. Engel* v. *O'Malley,* 219 U. S. 128, 139. See, also, *Hopkins* v. *United States,* 171 U. S. 578, 588, 590; *Anderson* v. *United States,* 171 U. S. 604, 615-616." (Italics supplied.)

The purchase of an interest in an oil royalty which may never result in (and does not necessarily contemplate) a shipment of oil in interstate commerce, is equally within the rule just quoted.

If, as a result of such purchase, shipments of oil may actually be subsequently made in interstate commerce, such shipments would not be so made because of any contractual obligation to that effect.

There is nothing in this act which attempts to purify the thing in commerce. The security which may be placed in the channels of interstate commerce is not sanctified by the grace of registration. Its value is not certified—indeed, even the truth of the prospectus which under the act must

accompany the security or *precede* it is not assumed or assured by the fact of registration.

The restraint placed upon the conduct of citizens by section 5, couched as it is as a pretended regulation of commerce, eloquently illustrates the resort to a pretended exercise of a delegated power "for the accomplishment of a wholly unrelated end."

As we have heretofore said, the Securities Act does not purify the channels of interstate commerce, nor does it cleanse the stream. Above all, it does not safeguard the purchaser or the recipient of the article subjected to such classification by the act.

Earlier statutes which prohibited the transportation of persons or objects in interstate commerce, were manifestly designed to protect and safeguard the stream of commerce, and prevent contamination not only of the steam itself, but the banks through which it flowed, as well as the depths it left in its course.

Thus, in *Reid* v. *Colorado,* 187 U. S. 137 (1902), diseased live stock was excluded to prevent the contamination of cattle domestic to the states through which the commerce flowed.

In *Champion* v. *Ames,* 188 U. S. 321 (1903), lottery tickets were excluded to prevent a nation becoming one of gamblers.

In *Hipolite Egg Company* v. *United States,* 220 U. S. 45 (1911), adulterated food products were required to be labeled for what they were, in order that the *facilities* of interstate commerce might not be *misused;* and in *Hoke* v. *United States,* 227 U. S. 308 (1913), and *Caminetti* v.

United States, 242 U. S. 470 (1917), the transportation of women for immoral purposes, was outlawed.

In *Brooks* v. *United States,* 267 U. S. 432 (1925), the transportation of stolen automobiles is prevented as a "gross misuse of interstate commerce."

The decisions in the foregoing cases, as well as in *McDermott* v. *Wisconsin,* 228 U. S. 115, were all clearly distinguished in *Hammer* v. *Dangenhart,* 247 U. S. 251, 62 L. ed. 1105.

The opinions of this court in *McDermott* v. *Wisconsin, supra; Caminetti* v. *U. S., supra,* and *Hammer* v. *Dagenhart,* were written by Mr. Justice Day in point of time in the order of their recitation, and in *Hammer* v. *Dagenhart, supra,* in which the child labor statute was considered, Mr. Justice Day reviewed the reasons supporting each of these decisions, as well as such other decisions as are cited by the Commission, and reaches a conclusion which not only is in conflict with the position of the Commission, but one which fully supports the petitioner.

After reviewing the entire question, in *Hammer* v. *Dagenhart, supra,* Mr. Justice Day, at length, stated that:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.
>
> "This element is wanting in the present case. The thing intended to be accomplished by this statute is the *denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages.* The act in its effect does not

regulate transportation among the states, *but aims to standardize the ages at which children may be employed in mining and manufacturing* within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

"Commerce 'consists of intercourse and traffic • • • and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. 'When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, *but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.*' Mr. Justice JACKSON in *Re Greene*, 52 Fed. 113. This principle has been recognized often in this court. *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299, and cases cited. *If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the state—a result certainly not contemplated by the framers of the Constitution when they vested in Con-*

gress the authority to regulate commerce among the states. Kidd v. *Pearson,* 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inter. Com. Rep. 232, 9 Sup. Ct. Rep. 6."

Mr. Justice DAY's statement is so justly applicable here, that it seems to the petitioner to be unanswerable; and the recent statement of Mr. Chief Justice HUGHES, in *Schechter* v. *United States,* 295 U. S. 495, 55 Sup. Ct. 850, 79 L. ed. 1571, to the same effect, which we quote, is equally applicable:

"* * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

See, also:

Panama Refining Co. v. *Ryan,* 293 U. S. 388.

In the *Child Labor Tax Case,* 259 U. S. 34, 66 L. ed. 820, Mr. Chief Justice TAFT reaffirmed the opinion in the *Dagenhart* case, by saying:

"* * * The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce,

but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the *Dagenhart* case, the application of the principle announced by Chief Justice MARSHALL in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, 4 L. ed. 579, 605, in a much-quoted passage:

> 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would became the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land'."

The petitioner further contends that a *security* is not in any event such article or commodity that it may be the subject of commerce between the states.

In *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, the Supreme Court upheld the validity of a Montana statute imposing a tax upon insurance premiums collected in that state, and in disposing of the contention of the insurance company that its business was interstate because conducted in large measure through the use of the mails, it was said, at page 509:

> "To accomplish the purpose there is necessarily a great and frequent use of the mails and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of c o m m e r c e among the states.' This use of the mails is necessary, it may be, to

the centralization of the control and supervision of the details of the business; *it is not essential to its character.*" (Italics supplied.)

A closely related series of cases are those setting forth the doctrine that insurance, in all its forms, is not interstate commerce. *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 56; *Philadelphia Fire Ass'n* v. *New York,* 119 U. S. 110; *Hooper* v. *California,* 155 U. S. 648; *Noble* v. *Mitchell,* 164 U. S. 367; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Nutting* v. *Massachusetts,* 183 U. S. 553; *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495.

In the latter case, it was urged that the enormous importance of insurance to interstate commerce, particularly in its relationship to the interstate shipment of goods, justified the reversal of its earlier decisions holding that insurance was not interstate commerce. The court, however, affirmed the doctrine announced in *Hooper* v. *California, supra,* where it was said:

"* * * the general rule (that insurance is not commerce) and its exceptions are based * * * (upon) the difference between interstate commerce or an instrumentality thereof on one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely do-

mestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea'."

These decisions establish that the business of insurance is not immune from state regulation as being interstate commerce. The corollary, that the business of insurance cannot be regulated by the Federal Government because it is not interstate commerce, would seem to follow. Indeed, a committee on the judiciary of the United States Senate unanimously reported that insurance was not subject to federal regulation as interstate commerce. (Senate Report No. 4406, 59th Congress, first session.)

In *Nathan* v. *Louisiana,* 8 How. 73, it was held that a broker engaged in the use of the mails in buying and selling foreign bills of exchange "is not engaged in commerce, but in supplying an instrument of commerce."

In *Hemphill* v. *Orloff,* 277 U. S. 537, a "Massachusetts trust" doing a business of buying and selling negotiable notes in various states was held not engaged in interstate commerce in respect to the ownership of notes of a resident of Michigan where it undertook to enforce them without having first complied with local law requiring domestication of corporations. The court said:

"Upon the facts disclosed the court below held the trust was carrying on a business of dealing in negotiable notes within the State of Michigan; and we find no reason for rejecting that conclusion. *Such business is not interstate commerce. Nathan* v. *Louisiana,*

8 How. 73; *Paul* v. *Virginia*, 8 Wall. 168; *Hatch* v. *Reardon*, 204 U. S. 152, 162; *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 444."

In *Graniteville Manufacturing Co.* v. *Query*, 44 F. (2d) 64, the validity of a South Carolina stamp tax was upheld as not imposing a burden on interstate commerce in respect of a series of notes executed by the plaintiff over a period of years—between 1923 and 1930—and sent by it to banks outside of the state for discount. The District Court of the Eastern District of South Carolina said:

> "The plaintiff contends also that the laying of the tax in question is a burden upon interstate commerce. But under the decisions of the Supreme Court it is plain that the notes in question did not constitute interstate commerce. They are mere personal contracts. The making of such a contract is a mere incident of commercial intercourse, and sending the notes by mail or otherwise from one state to another does not constitute interstate commerce. See *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 34 S. Ct. 167, 58 L. ed. 332, where the subject is fully discussed and the decisions reviewed."

The foregoing decision was affirmed in 283 U. S. 376.

Consideration of the act as a whole, we think, can lead to no other conclusion than that it is in violation of the Tenth Amendment, and is an attempt upon the part of Congress to regulate the sale and purchase of securities. The court will quickly perceive by comparing the information required in a registration statement by section 7, the effective date of the registration statement as provided by section 8, the information required in a prospectus by section 10 and by Schedule A of the Act, with the civil liabilities imposed by sections 11 and 12 of the Act, with the

provision of subsection (d) of section 6, which makes the information in or filed with *a registration statement available to the public*, that the object of the act is to safeguard the investing public—not to regulate the postal service or interstate commerce. Section 7 does not provide that a registration statement shall contain such information as will show that the security described is a proper subject of commerce.

Section 11 does not attempt to impose civil liabilities for misuse of the mails or the instrumentalities of interstate commerce, but rather for the sale of securities based upon a registration statement which contains an untrue statement of a material fact or for the omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

The act itself presents an identical picture with that which was before the court in *Hammer* v. *Dagenhart, supra*, and for the reasons expressed by the court in that opinion should be held to be an invasion of constitutional guaranties.

(b) *The Use of the Mails.*

The power to "establish post offices and post roads", has been held to comprehend the right to regulate the postal system of the United States and generally to determine what may or may not be carried in the mails.

—*Ex parte Jackson*, 96 U. S. 727.

Cases in which this power of the Congress has been upheld have very generally related to matter which might be excluded because properly considered contrary to pub-

lic policy or inimical to the public welfare, such as matter concerning the lotteries, *Ex parte Jackson, supra;* matter involving schemes to defraud, *Public Clearing House* v. *Coyne,* 194 U. S. 497; matter of a scurrilous or defamatory nature, *Warren* v. *United States,* 183 Fed. 718; matter tending to incite treason or forcible resistance to the laws of the United States, *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407; and matter of an obscene or indecent nature, *Coomer* v. *United States,* 213 Fed. 1; *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385; *United States* v. *Journal Co.,* 197 Fed. 415.

The provisions of the act attempting to exclude from the mails correspondence, or other matter relating to the business of buying and selling securities, would, therefore, involve an extension of this power of Congress in a manner not heretofore attempted, and, it is respectfully submitted, without warrant under the Constitution.

The provisions of the act in this respect would seem to be founded upon some such assumption of power as that contended for by the government in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 57 L. ed. 1190, which contention as paraphrased in the opinion of the court, was said to constitute

> "* * * an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative selection as to what shall be carried in the mails and which therefore is not in anywise subject to judicial control even although in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy."

In refusing to adopt the view that the power of Congress to control the use of the mails involved any such unlimited application, the court, speaking through Chief Justice WHITE said at page 316:

> "* * * we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated."

The power of Congress to control the use of the mails may not be exercised in such manner as to deny or destroy rights, either guaranteed by other provisions of the Constitution, or expressly reserved to the people by the Tenth Amendment.

In *Ex parte Jackson*, 96 U. S. 727, the court said at page 732:

> "The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people of far greater importance than the transportation of the mail."

Nothing in the opinion of the court in *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, is at variance with this doctrine for, as stated in the dissenting opinion of Mr. Justice BRANDEIS, at page 430:

> "The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which

carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails. *In re Rapier,* 143 U. S. 110; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. As stated in *Ex parte Jackson,* 96 U. S. 727, 732: 'The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.' *In other words, the postal power, like all of its other powers, is subject to the limitations of the Bill of Rights. Burton* v. *United States,* 202 U. S. 344, 371. Compare *Adair* v. *United States,* 208 U. S. 161."

It is not to be believed, therefore, that the Commission under color of the power conferred by the act, may prescribe rules and regulations destructive of the constitutional rights of those engaged in the buying and selling of unlisted securities in over-the-counter markets. To so hold would concede to the Commission a power which Congress does not possess and which might be exercised in such manner as to hinder and delay, if not in fact to render impossible the transaction of important business of a purely private nature, the conduct of which is as much in the public interest as is the correction of the economic conditions which the act was designed to effect.

In its operation and effect, the Securities Act regulates individual sales and purchases of securities, but it does not regulate the mails. It is therefore void, because it transcends the power of Congress in violation of the Tenth Amendment to the Federal Constitution.

The regeneration of the human race and the purification of the hearts of men, are matters that have not been intrusted to the national Congress.

The wording of the act leaves no mist between the eye and its application. It applies to the person—not the thing.

Judge MANTON, speaking for the Circuit Court of Appeals, 79 F. (2d) 619, said:

> "The appellant contends that the Securities Act of 1933, as amended, is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control *over the use of the mails,* is fully sustained by the cases which have considered the mail fraud statutes."

Citing:

Badders v. *United States,* 240 U. S. 391, 36 S. Ct. 367, 60 L. ed. 706;

Public Clearing House v. *Coyne,* 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092;

In re Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93;

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877.

The statement of Judge MANTON pretermits the constitutional question upon the commerce clause, as we have heretofore said, and sustains the act upon the authority of *mail fraud* cases which we think are wholly unrelated to the subject.

A brief notice of the cases cited by Judge MANTON will be made.

Badders v. *United States, supra,* involved the indictment of Badders for having *deposited* letters in the United States mail,

> "* * * for the purpose of executing a *scheme to defraud,* devised by him. * * *."

The contention in the Supreme Court was,

(a) that the provisions of the Criminal Code are,

"* * * beyond the power of Congress, as *applied to what* may be a mere incident to a fraudulent scheme that itself is outside the jurisdiction of Congress";

(b) and that cumulative punishment for the separate deposit of separate letters constituted cruel and unusual punishment.

Justice HOLMES, speaking for the court, said:

"These contentions need no extended answer. The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877. Whatever the limits to the power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not. *Re Rapier,* 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 507, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; *United States* v. *Stever,* 222 U. S. 167, 173, 56 L. ed. 145, 147, 32 Sup. Ct. Rep. 51. See *Lottery Case (Champion* v. *Ames),* 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *United States* v. *Holte,* 236 U. S. 140, 144, 59 L. ed. 504, 505, L. R. A. 1915D, 281, 35 Sup. Ct. Rep. 271. Intent may make an otherwise innocent act criminal, if it is a step in a plot. *Aikens* v. *Wisconsin,* 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3; *Swift & Co.* v. *United States,* 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276. The acts alleged have been found to have been done for the purpose of executing the scheme, and there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them. The whole matter is disposed of by *United States* v. *Young,* 232 U. S. 155, 161, 58 L. ed. 548, 551, 34 Sup. Ct. Rep. 303."

Clearly, such conclusion so eminently correct in that case, does not authorize the conclusion that Congress might establish an agency to first determine whether the letters which Badders wished to deposit would offend the postal laws.

That will entail endless difficulties. Badders and every other citizen deposits his letter in the mail *at his peril,* if it violates the Criminal Code of the United States, or of the state in which it is deposited, and that rule is generally respected by the user of the mails.

That is as it should be, and the Government is now armed (as this case so well points out) with all of the authority it needs to regulate the mails.

Of course, regulation of the conduct of the user of the mails before such use, greatly broadens the field and cannot be sustained as a regulation of the use of the mails.

In *Public Clearing House* v. *Coyne, supra,* Mr. Justice Brown said:

> "The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded; and that in the enforcement of such regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guaranty a g a i n s t unreasonable searches and seizures extended to letters, but did not extend to printed matter. In establishing such system

Congress may restrict its use to letters, and deny it to periodicals; it may include periodicals and exclude books; it may admit books to the mails, and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of Act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact; such, for instance, as liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefits of its postal service, and deny it to another person in the same class, and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as, in its judgment, are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has

never been attacked. The same provision was, by the same act, extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374."

We think the foregoing well summarizes the power of Congress with regard to the mails, and inasmuch as *Ex parte Jackson, supra, Clearing House* v. *Coyne, supra,* and *Re Rapier, supra,* each involve some phase of the lottery question, what was said by Mr. Justice BROWN will apply with equal importance with regard to each of the cases cited by Judge MANTON.

If Congress may regulate the conduct of the *dealer in securities before he uses the mails,* then Congress may regulate the conduct of *every other use of the mails for any purpose whatsoever;* and inasmuch as the use of the mails is indispensable to the activities of citizens in any field of endeavor, the extension of congressional control to the extent contended for by the government, would subject the citizen's right to pursue such activities to the absolute domination of the Federal Government.

An extended and learned opinion reviewing the postal powers of Congress, was lately rendered by Judge COLEMAN in the United States District Court for the District of Maryland, in *Re American States Public Service Co.,* 12 Fed. Supp. 667-711, inc.

We quote from that opinion:

"Turning now to the question of the right of Congress to exclude these companies from the use of the mails as it purports to do by the equally broad provisions of the Public Utility Holding Company Act, the argument is made that whatever may be said with re-

spect to possible limitations upon the power of Congress to restrict the use of the instrumentalities of interstate commerce, the force of this reasoning disappears when we turn to a consideration of the mails, *because the power of Congress over the mails is by the Constitution proprietary and absolute;* that there can be no mail facilities except those which Congress itself creates and over which it has entire dominion; whereas interstate commerce exists as an inherent thing; it was not created by any power granted in the Constitution, and Congress is given power merely to regulate such commerce, albeit, in some instances, the power to regulate must, in the public interest, imply the power to prohibit or exclude.

"A correct answer to this argument implies some consideration of the history of the postal power of Congress. This power flows from article 1, sec. 8, cl. 7, of the Constitution, whereby Congress is given power 'to establish post offices and post roads.' The Federalist contains but a single reference to this power (The Federalist, No. 42). Likewise, there was little discussion or debate in the Constitutional Convention with respect to this clause, perhaps due to a fear, on the part of some at least, of appearing to give the central government too much power, and thus endangering the chances of adoption of the Constitution as a whole. See Farrand Records of the Federal Convention, vol. 1, p. 243; vol. 2, pp. 135, 177, 303, 324, 590, 615; vol. 3, pp. 604, 607.

"In the early years of the government, the view was maintained by some that by this grant Congress was given merely the power to designate the routes over which the mails should be carried and the post offices where they should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not include the power to construct and operate agencies for the actual carrying and distribution of the mails. See President Monroe's Veto of the Cumberland Road Bill, May 4, 1822; 'The Postal

Power of Congress' by Lindsay Rogers; Studies in Historical and Political Science, vol. 34 (1916), Johns Hopkins University Studies. However, the rapid expansion of the mail service from the very creation of our government, and its ever-increasing importance in the everyday lives of our people, are common knowledge. Suffice it to say for the present inquiry that whereas the form of the original grant was merely to establish post offices and post roads, nevertheless, to create and regulate the entire postal system of the country has been declared by the Supreme Court to be the evident and necessary intent of this grant. That is, a power in Congress far beyond the limitations of a precise interpretation of the form of the grant has for many years been conceded. In other words, the Supreme Court has declared that the grant necessarily carried with it the right to exercise all power incident to making the grant effective. So Congress may exclude articles dangerous to mail employees or injurious to other mail matter, and may prevent the use of the mails for fraudulent purposes or in derogation of the public morals. See *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *In re Rapier*, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092. Similarly, privileges such as second-class mail rates may be granted to one class of mail matter and denied to another, and the special privileges so conferred may be conditioned or revoked for cause. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 L. ed. 1190; *United States, ex rel. Milwaukee Publishing Co.*, v. *Burleson*, 255 U. S. 407, 41 S. Ct. 352, 65 L. ed. 704. In all of these instances, however, the exclusion related directly to the matter itself sought to be transmitted by the mails, that is, to the *offending thing* * * *. *We are thus brought face to face with the question whether Congress may, in the exercise of its postal power, thus arbitrarily exclude any and all matter from the mails even though harmless in character, as a means primarily of con-*

trolling the persons who would thus transmit the harmless things and not the things themselves. This precise question appears never to have been presented to the Supreme Court for decision.

"How far has Congress gone in the matter of exclusion which has been upheld as a valid exercise of the postal power? The following exclusions have been upheld: Lottery tickets and related matter *(Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877; *In re Rapier,* 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; *Horner* v. *United States,* 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266). Obscene matter *(United States* v. *Chase,* 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117; *Grimm* v. *United States,* 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550). Seditious matter *(United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson,* 255 U. S. 407, 41 S. Ct. 352, 65 L. ed. 704). Publications which fail to furnish information relative to ownership and circulation *(Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 33 S. Ct. 867, 57 L. ed. 1190). Fraudulent matter *(Public Clearing House* v. *Coyne,* 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092; *Badders* v. *United States,* 240 U. S. 391, 36 S. Ct. 367, 60 L. ed. 706).

"Thus it will be seen that exclusion has been upheld for the purpose of preventing use of the mails for an unlawful purpose, although Congress lacked the power to deal directly with the wrong involved. For example, it was said as early as 1877, in *Ex parte Jackson, supra* (96 U. S. 727, at page 732, 24 L. ed. 877), where a law was upheld forbidding lottery circulars in the mails:

> 'The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.'

"Similarly, it was said in the case of *In re Rapier, supra* (143 U. S. 110, at page 134, 12 S. Ct. 374, 36 L. ed. 93), which confirmed *Ex parte Jackson,* and upheld exclusion from the mails of newspapers containing lottery advertisements: 'The states, before the Union was formed, could establish postoffices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish postoffices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.'

"But are there no limitations upon the right of Congress to determine what shall be excluded? May such right be exercised arbitrarily, in derogation of rights guaranteed by other parts of the Constitution? May Congress in fact indirectly, through its postal power, interfere at will with constitutional guaranties, when such interference would be prohibited if attempted directly? In spite of certain statements in some of the earlier decisions which, if isolated and considered apart from the precise facts and the *ratio decidendi* of the given case, may lend some little support to an affirmative answer to this question, we nevertheless believe that the law is otherwise. Obviously, the First Amendment, which guarantees freedom of speech and of the press, is not violated by exclusion from the mails of lottery tickets *(Ex parte Jackson; In re Rapier, supra);* nor of seditious matter *(United States, ex rel. Milwaukee Pub. Co.* v. *Burleson, supra);* nor of publications which fail to furnish information relative to ownership and circulation *(Lewis Publishing Co.* v.

Morgan, supra). Similarly, the guaranty of due process of law under the Fifth Amendment is not denied by excluding from the mails publications which do not comply with postal regulations requiring information as to ownership and circulation *(Lewis Publishing Co.* v. *Morgan, supra);* or seditious matter *(United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson, supra);* or when letters sent for illegal purposes are seized and returned to the sender, under postal regulations; or where the Postmaster General, in the exercise of authority vested in him by Congress, determines, on the basis of substantial evidence, upon exclusion of certain matter after due notice, and after a hearing had been afforded *(Public Clearing House* v. *Coyne; United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson, supra).*

"Has exclusion from the mails ever been upheld by the Supreme Court where the matter excluded was not, in and of itself, either *(1)* offensive or harmful to the public generally, or *(2)* not in compliance with postal regulations reasonably calculated to aid in the efficient maintenance and conduct of the mail service? Our investigations disclose no such decision. But, it is said, the Supreme Court has never been called upon directly to decide the question of how far exclusion may go. True, but the decisions very definitely support the conclusion here reached, to-wit, that the exclusion must rest directly upon a regulation of the mails, that is, of the *use* of the mails—of the *thing* mailed—and not upon a regulation of the *user.*

* * * * * * * *

"Whether or not the right to send or receive matter through the mails actually owes its existence to the postal clause in the Constitution, it is certain that such a right would be a purely empty and abstract one were it not for the postal facilities supplied and maintained, by virtue of this clause, exclusively by the federal government. Nevertheless, this clause must be construed in the light of definite prohibitions in the Constitution. That is to say, 'what cannot be done directly because

of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. * * * Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.' *Fairbank* v. *United States,* 181 U. S. 283, 294, 300, 21 S. Ct. 648, 658, 45 L. ed. 862. 'If the means employed have no real substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case—the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt.' *Union Bridge Co.* v. *United States,* 204 U. S. 364, 397, 27 S. Ct. 367, 378, 51 L. ed. 523.

* * * * * * * *

"* * * In the first *Child Labor Case* the question, succinctly stated, and which the Supreme Court answered in the negative, was this: May Congress, under the guise of regulating interstate commerce—a plenary power within its given sphere—prohibit transmission in interstate commerce of goods manufactured by child labor? Substitute for 'interstate commerce,' 'the mails' (parcel post), and we have, in principle, the very question presented now, to which the same answer must be given, unless it be erroneously conceded that the power of Congress to exclude from the mails is absolutely without limitation; that upon the exercise of such power, there must disappear those reserved powers of the states guaranteed by the Tenth Amendment, and that due process of law guaranteed by the Fifth Amendment. If Congress may thus employ the postal power, why may not, for example, the power to control the nation's currency, and patents and copyrights—both of the same plenary character—be simi-

larly employed, with the result that persons, when found to have offended against this or that regulatory measure having no relation, however, to the use of money, or to 'the progress of science and the useful arts,' would be denied completely the right either to spend, or to save any money, or to enjoy the fruits of their inventive or artistic talents.

"We are not dealing here with a mere question of legislative discretion. The facts are not debatable. If they were, it would not be permissible for this court to set up its opinion against the opinion of the lawmakers. *Radice* v. *New York,* 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. ed. 690; *Stephenson* v. *Binford,* 287 U. S. 251, 272, 53 S. Ct. 181, 77 L. ed. 288, 87 A. L. R. 721.

"What has been said with respect to the inseparability of the multifarious provisions of the Public Utility Holding Company Act that bear generally upon the commerce clause, we find equally applicable to those that relate directly to the use of the mails and instrumentalities of interstate commerce. These reprisal provisions are so interwoven in the act as not only to render them incapable of separation, but also to leave no reasonable ground for assuming that Congress would have enacted the law without them."

In 1916, Dr. Lindsay Rogers, Professor of Political Science in the University of Virginia, prepared a study of constitutional expansion, entitled,

"The Postal Power of Congress,"

which was then published by Johns Hopkins University Press.

Some mention of this learned treatise has been made in the course of the consideration of this case, and by reason of the time that has elapsed since the publication thereof, the views therein expressed may be received without the criticism of present-day political taint.

We quote:

"* * * Any legislation excluding from the mails must apply directly to the *things* mailed, not the persons using the mails * * * the fact that the ends to be attained are unconnected with the use of the mails, would prevent the legislative fiat from being final (p. 176).

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty —indeed under a solemn duty—to look at the substance of things, whenever they enter upon an inquiry as to whether the legislature has transcended the limits of its authority. If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution,"

—*Mugler* v. *Kansas,* 123 U. S. 623,

and,

"* * * are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."

—*Houston* v. *Moore,* 5 Wheat. 1.

This court has adhered to "the great principle that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result."

—*Fairbank* v. *United States,* 181 U. S. 283.

We quote further from the Postal Power of Congress, *supra,* in closing this portion of the argument:

"The phrase is that of Grote, who, describing Athenian Democracy in the time of Kleisthenes, emphasized the necessity for * * * 'a perfect confidence

in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be no less sacred in the eyes of his opponents than his own.' Such constitutional morality he called 'a natural sentiment', as it exists in the United States, but these words will no longer be true if Congress may extend its control in the manner proposed, without waiting for a grant of authority in the manner provided in the Constitution.

"And if courts should permit such extension of federal control, enormous powers will, by judicial construction, be taken from the states and given over to the national legislature. For, as it is hardly necessary to remark, the denial of postal and interstate commerce facilities would be almost as efficacious as positive legislation; without using the mails and the channels of trade no business could successfully exist. If congressional control may be thus extended, every business and every individual needing to use the mails would become subject to federal regulation on the vague ground of public policy. The reserved powers of the states would then exist only by the sufferance of Congress, and the cardinal theory of the American system—that the federal government is one of enumerated powers—would become a cynical fiction."

II.

The Denial of Authority to Force Petitioner's Attendance by Subpoena.

At the time the respondent commenced this action in the District Court at New York City, the petitioner in response to a rule to show cause, challenged the jurisdiction for the reasons indicated at pages 6 and 7 hereof.

The objections there made (other than constitutional and the denial of jurisdiction by reason of petition for review then pending in the Circuit Court of Appeals upon which *certiorari* was denied in No. 639) may be summarized as denying:

(a) the authority of the respondent to issue a subpoena;

(b) the validity of the orders denying the right to withdraw petitioner's registration statement;

(c) the validity of the Commission's rule (release) No. 47, for the failure to publish as required by 19-(a) of the Act, and because the rule failed to include findings of fact showing the necessity for such rule, and finally because such rule is not authorized by the Act;

(d) the validity of the respondent's orders denying petitioner's motions to dismiss and withdraw his registration for the failure to support such orders by the necessary findings of fact, which would bring them within an exception to that part of Rule No. 47, which requires that the respondent's consent to an application to withdraw a registration statement shall be given with due regard to the public interest and the protection of investors.

These objections are so inter-related that a consideration thereof will be undertaken in a discussion of a general

denial of authority to require petitioner's attendance by subpoena.

A review of the proceedings before the Commission's Examiner on June 18th, 1935 (Appendix "D," pp. 83-87), and again on June 27th, 1935 (Appendix "E," pp. 88-96), will disclose that petitioner twice informed the Commission in unmistakable language, of his desire to withdraw his registration statement.

The record also shows that not a unit of the issue proposed in the registration statement has (or had) been sold; and that the trust, which was to issue such units, existed nowhere except in petitioner's mind, and his registration statement clearly informed the Commission of these facts.

When the Commission's telegram, quoted in the record, was received by petitioner, informing petitioner that the Commission was about to embark upon a "fishing expedition" upon other transactions in which petitioner is, or had been interested, he properly and promptly elected to withdraw his registration statement.

The Commission denied this right.

The source of the Commission's power and authority is, of course, the statute. The statute does not prohibit the withdrawal of the registration statement; nor does it say that it may not be withdrawn without the consent of the Commission. It is silent upon this subject. But the Commission promulgated a rule (which is called a release) numbered 47, printed in its entirety as Appendix "H," pp. 105-110, which, in part, provides:

> "Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto.. * * * *Such*

consent shall be given by the Commission with due regard to the public interest and the protection of investors." (Italics ours.)

Congress, by failing to make any provision governing the withdrawal of registration statements, undoubtedly intended that the general rules of law and procedure governing such matters should apply. Let us see what they are.

Hearings before this Commission certainly do not rise to greater dignity than suits before a court. Registrants before the Commission are still citizens of the United States —not subjects of the Commission.

District Judge EVANS, speaking for the Fifth Circuit Court of Appeals in *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284, said:

> "The general rule is that a plaintiff may discontinue his action as a matter of course before hearing."

He then points out certain exceptions, as where the substantial rights of the defendant would be injuriously affected by the dismissal.

The United States Supreme Court in *Barrett* v. *Virginia Railway Co.*, 250 U. S. 473, held that,

> "At common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment."

And the court said that,

> "The right is substantial."

The Supreme Court again spoke upon this subject in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 87, and said:

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the

proceedings prior to verdict or judgment, and his right has been declared to be substantial."

And the court further said:

"The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action."

See:

Thomson-Houston Electric Co. v. *Holland,* (D. C.) 160 Fed. 768.

We submit to the Court that it would require a legislative enactment, specific and clear in its terms, to prohibit the withdrawal of a registration statement, when such withdrawal is sought before any rights of the public have attached by the sale of securities described in the statement; that Congress has not granted any such authority as the Commission seeks to exercise; that it has not authorized the Commission to so legislate, and, if the act attempts to give the Commission such power, it is void as a prohibited delegation of legislative powers.

—*Panama Refining Co.* v. *Ryan,* 293 U. S. 388;

Schecter Poultry Corp. v. *United States,* 55 Sup. Ct. Rep. 837.

The record shows that the Commission, to support its denial of appellant's right to withdraw his registration statement, leans upon Release 47 *(supra);* but, borrowing a phrase from Mr. Justice CARDOZO, "the prop was insecure and warning of its insecurity was not lacking."

We urge,

First. The rule is not authorized by the statute. The Commission is authorized by section 19(a) of the statute to make such rules and regulations as are necessary to

carry out the provisions of Title I of the act. The refusal of the right to withdraw petitioner's registration statement thwarts the clear intention of Congress and runs counter to the plain and unambiguous terms of the act. It necessarily follows that the rule is in derogation of the common law and a prohibited delegation of legislative power if authorized by the statute.

Second. Rules and regulations of the Commission have the force and effect of laws. It is a crime to violate them. The penalty for such violation is drastic and the punishment severe. Congress was not willing to subject a citizen to such drastic penalties and severe punishments, without some safeguard of his rights. So it provided in section 19(a) that:

> "The rules and regulations of the Commission shall be effective upon publication in the manner in which the Commission shall prescribe."

Therefore, a prerequisite to the effectiveness of any rule or regulation of the Commission is, *first,* the adoption by it of a plan prescribing the manner in which its rules and regulations shall be published and, *second,* publication of the rule or regulation in the prescribed manner. Of course, the manner of the publication must be such that it will give the public notice of the rule or regulation.

An examination of the releases given out by the Commission fails to disclose the adoption of any plan or rule by the Commission prescribing the manner in which its rules and regulations shall be published. If it has adopted any such plan or rule it remains concealed in its own bosom. Did not Congress also intend by the wording of this act that the public be apprised of the manner in which the Com-

mission's rules and regulations would be published? Unless the public has such information, how may it know when the rules and regulations are effective? When Congress gives a board or commission the right by rule or regulation to make illegal the doing of something that has been legitimate and legal as far back as history tells the story of man, and the doing of the act, after promulgation of such rule, is made punishable by heavy fine and severe imprisonment, does not due process of law require that such rule be made known to the citizen before it becomes effective?

Is the citizen required to perform the almost impossible task of daily checking the files of innumerable bureaus at Washington—to say nothing of those of this state—or act at his peril?

Release No. 5 of July 6, 1933 (printed in its entirety in Appendix "G," pp. 102-104), is the Commission's only release (prior to Release No. 47, quoted *supra)* which even remotely deals with the subject, and it falls far short of the statutory requirement. It fails to provide any manner in which the rules and regulations shall be published. It merely attempts to approve a set of "experimental" rules.

Rule 47, *supra,* appears to have had no official proclamation or publication and the Commission relies upon it as its authority to deprive respondent of what the Supreme Court says is a substantial common-law right. Certainly this procedure is a departure from our time-honored traditions.

The statute does not intimate that Congress so intended; much less does the statute express such intent in ex-

plicit language. Due process of law stands between this rule and its enforcement.

—*Champlin Refining Co.* v. *Corporation Com.*, 286 U. S. 210.

The rule is not based upon any finding of facts which show that it is necessary to serve the "public interest and protect investors." So for another reason it totally fails.

—*Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

Thus the Commission's contention that under Rule 47 *(suprà)* it had the right to prevent petitioner from withdrawing his registration statement is supported by nothing more substantial than thin air.

Third. Assuming, but not conceding, that Rule 47 *(supra)* is authorized by the act and that it has been issued and published pursuant to the act, the Commission's order denying the petitioner the right to withdraw his registration statement is nevertheless void, because the rule provides that "such consent shall be given by the Commission with due regard to the public interest and the protection of investors." This requires the exercise of sound discretion by the Commission. The order denying the right to withdraw a registration statement must be based upon facts which show that it would be inimical to the public interest and the protection of investors; otherwise it is arbitrary, capricious and void.

The complained of ruling was peremptory. If it was based upon an exercise of discretion, the discretion was plainly abused.

The Supreme Court, speaking through the Chief Justice, in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, said:

> "If a citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends upon determinations of fact, those determinations must be shown."

If the necessary finding of facts is lacking, the order is ineffective.

—*Wichita Railroad & Light Co.* v. *Public Utilities Com.*, 260 U. S. 48, 67 L. ed. 124.

It is a criminal offense to violate the orders of this Commission (Sec. 24).

In the lower court counsel for the Commission argued that if the petitioner were permitted to withdraw his registration statement, he might proceed with the sale of his securities without registration. That is not an answer. If he does so, Congress has provided the penalty. If he violates the law or the rules and regulations of the Commission, he may upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both (Sec. 24). If he violates the law or the regulations or is about to do so, the Commission may enjoin him (Sec. 20a).

They may not, however, hold him before the Commission and force him to proceed with a registration *examination* which he wishes to abandon.

The Commission holds to the view that it is mandatory upon the petitioner to submit to a hearing and examination, at its pleasure, once he has filed a registration statement. This contention finds no support in the act. Section 8(d) provides that:

"If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after *opportunity* for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, *issue a stop order suspending the effectiveness of the registration statement.*" (Our italics.)

To say that this section of the act requires one who files a registration statement to appear at such hearing and defend himself against an innuendo which the Commission says it has "reason to believe", is to do violence to the plain language of the section. The act provides that the Commission, before issuing a stop order, must give the registrant an *opportunity* for hearing. It does not command the registrant to take advantage of the opportunity.

He may let the hearing go by default and permit the stop order to go against him without complaint. It is his privilege to select the road upon which he will travel. If he defaults, the Commission may and should issue a stop order. It could do no more if it *conducted a thousand hearings* and made *as many examinations.*

Section 8(e) does not strengthen the Commission's position. It provides that the Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). Therefore, subsections (d) and (e) must be considered together. Subsection (d) requires an opportunity for hearing. If the registrant takes advantage of the opportunity and

forces a hearing, then the Commission may proceed under subsection (e); otherwise it may not—for there is no occasion for any further proceeding.

All that the Commission can do in any event with respect to an effective registration statement, is to issue a stop order suspending its effectiveness and that specific power was particularly granted to respondent where a registrant "refuses to permit the making of an examination."

We quote from section 8(e):

> "* * * if the issuer shall fail to co-operate or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order."

Thus, the power of the respondent to issue a stop order has been fully safeguarded by Congress.

We submit, that it is manifest, that Congress never intended the respondent to have the power which it asserts here—to reach out, select an individual registrant and force him to actively participate in a "stop order" proceeding.

If Congress had otherwise intended, the phrase,

> "* * * if the issuer shall * * * *refuse to permit* the making of an examination * * *," (Sec. 8(e))

would never have been employed.

Manifestly, therefore, it is entirely optional on the part of a registrant whether he will avail himself of the "opportunity for hearing" which it is the duty of the respondent to "afford" him upon notice, or submit to a stop order under subdivision (e).

Obviously, the Commission cannot commence to function as a *quasi*-judicial body until a registration statement

has been filed before it. Its *quasi*-judicial functions commence when it makes an examination of the registration statement itself and determines whether on its face such registration statement is in conformity with the statute. If it appears to be deficient in any material respect, the Commission, after affording an opportunity for hearing, may *order an amendment*, enter a *refusal* order, or enter a *stop* order. *It may do no more.*

We do not contend that the Commission's powers in respect to a false registration statement cease upon the issuance of a stop order. The contrary we submit is quite clear. This is so, because section 19(b) authorizes the respondent to proceed affirmatively in the matter of *investigations* which in its opinion are necessary and proper for the enforcement of the act,

It is a criminal offense for any person to wilfully file a registration statement which is incomplete or false. (Sec. 24)

Should the Commission have reason to believe that any person is guilty of such an offense, it is then authorized to proceed affirmatively and make a complete investigation of the facts under section 19(b), and

> "• • • for the purpose of all *investigations* • • • any member of the Commission or any officer or officers designated by it are empowered to administer oaths • • • *subpoena witnesses,* take evidence, and *require* the production of any books, papers, or other documents, which the Commission deems relevant or material to the inquiry."

The foregoing grant of the power to subpoena witnesses, to require the production of books and papers *and*

take evidence, is the only such power conferred upon the respondent. Clearly, such power is limited to *investigations.*

But the respondent was not pursuing an investigation of the petitioner—it was acting upon his registration statement—its proceedings were confined to the provisions and the scope of section 8, where no such power of subpoena has been conferred, or as we have clearly shown, is necessary to enable the respondent to enter a *stop* order.

Reference to the record clearly establishes that the respondent was not pursuing an investigation under the authority of section 19(b), but was acting upon the petitioner's registration statement. This clearly appears in a document which was printed in the record (Case No. 639, p. 139) which is on file in the office of the clerk of this court. We reprint it here:

> "*Commission Minute Authorizing the Institution of Stop Order Proceedings.*
>
> Meeting of Securities and Exchange Commission, May 20, 1935, 3:30 P.M.
>
> "Upon the recommendation of the Registration Division and the Legal Division, and it appearing to the Commission that there are reasonable grounds for believing that the registration statement filed by J. Edward Jones (File 2-1408) includes untrue statements of material facts and omits to state material facts required to be stated therein or necessary to make the statements therein not misleading, the Commission directed that stop order proceedings be instituted against said registration statement."

The entry of this order certainly prevented the registration statement of the petitioner becoming effective (May 24, 1935) four days later, as the Commission has contended.

When the Commission made its order on May 25th, 1935, and its subsequent orders upon the subject-matter, such orders were captioned in each instance, as,

"In the Matter of Registration Statement of J. Edward Jones, File No. 2-1408."

The proceedings before the respondent, which were held on the 18th of June and the 27th of June, 1935, are also entitled,

"In the Matter of the Registration Statement of J. Edward Jones, File No. 2-1408-1."

Notwithstanding the record, respondent now assumes the position stated on page 18 of its memorandum to this court on *certiorari*, that,

> "Furthermore, the proceedings before the Commission seem to have been directed not only at a potential stop order under Section 8, but also at an investigation under section 19(b)."

In its opinion, the Circuit Court of Appeals disregarded petitioner's argument, and held that,

> "* * * a proceeding under Section 8(d) is such an investigation."

Such an interpretation does plain violence to the structure and manifest intent of the act.

The conclusion of the Circuit Court, to the effect that petitioner's opportunity to show cause why his registration statement should not be suspended, could be *converted* into an *investigation* for the purpose of detecting a criminal violation of the act, manifestly denies due process of law.

If the Commission is seeking to accomplish such purpose then it is pursuing a course vigorously condemned by

the United States Supreme Court in the opinion of Mr. Justice HOLMES in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 32 A. L. R. 786, where he said:

> "The mere facts of carrying on a commerce not confined within state lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 43, 62 L. ed. 135, 140, 38 Sup. Ct. Rep. 30. Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville Railroad Co.*, 236 U. S. 318, 335, 59 L. ed. 598, 606, P. U. R. 1915-B, 247, 35 Sup. Ct. Rep. 363."

It will be helpful to inquire into the motives which impel the Commission to its course of action.

Reference to the Commission's specification of the al-

leged deficiencies of petitioner's registration statement and to the pleading it filed in the District Court (R. 2-15, inc.), clearly indicates that respondent desires to examine petitioner upon matters pertaining to other business not connected with the proposed securities covered by the registration statement.

If the Commission is not actuated by such motive in this proceeding and is only desirous of serving the public interest and protecting investors, it is difficult to understand why it has not issued a stop order based upon the petitioner's refusal to co-operate or permit the examination. It is also difficult to comprehend why the Commission has so zealously pursued a course of action which it contends enabled the registration statement to become effective despite the petitioner's efforts to abandon the entire project before he has even offered his proposed issue for sale.

We respectfully submit, therefore, that if the Commission be permitted to retain jurisdiction of petitioner and conduct the hearing which it proposes to conduct, it would in no way serve the public interest or protect investors; it would not protect the postal service, nor facilitate or purify the movement of commodities in interstate commerce; it would accomplish no useful purpose; it would (as it has already) continue to cost petitioner large sums of money and the sacrifice of valuable time; all of which would but be a usurpation of power not conferred by the statute, and an invasion of states' rights in violation of the 10th Amendment to the Federal Constitution, as well as a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution, and finally an invasion of the protection against unlawful search and seizure guaranteed by the 4th Amendment.

Conclusion.

The petitioner respectfully submits, that:

(a) the act is unconstitutional and void;

(b) there is no proceeding now pending before the Commission to which an order to appear and testify can attach;

(c) the subpoena of the Commission is unauthorized by the statute and cannot be enforced;

(d) the proposed proceedings of the Commission are in violation of the powers conferred upon it by the statute;

(e) Rule No. 47 is void, for the failure to recite the facts therein upon which it is founded, and for the further failure to provide a manner of legal publication for this as well as all other rules of the Commission;

and prays that the judgment and decree of the Circuit Court of Appeals for the Second Circuit be reversed in its entirety.

Respectfully submitted,

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APPENDIX A.

Opinion of the Circuit Court of Appeals.

MANTON, Circuit Judge.

Appellant filed a registration statement covering a forthcoming issue of participation trust certificates pursuant to Sec. 6 of the Securities Act of 1933 as amended (48 Stat. 74; 48 Stat. 905; 15 U. S. C. Sec. 77a) with the appellee. It was filed May 4, 1935, and on May 23, 1935, notice of a hearing on this statement was sent to the appellant by the Commission. On June 18th a hearing was had and appellant attempted to withdraw his registration statement which was denied by the officer conducting the hearing for the Commission. This ruling was based on the regulation of the Commission providing:

> "Any registration statement or any amendment thereof may be withdrawn upon the request of the registrant if the Commission consents thereto * * * which consent shall be given by the Commission with due regard to the public interest and the protection of investors."
>
> (Release No. 47 of the Federal Trade Commission, Sept. 22, 1933.)

Appellant filed a petition to review the action of the Commission refusing permission of withdrawal of his registration statement. The appellee moves to dismiss the petition to review contending that it was prematurely brought since no order had been entered by the Commission within the meaning of Sec. 9 (a) of the Securities Act (48 Stat. 80; 15 U. S. C. 77i) and that therefore the court has no jurisdiction to entertain this petition. Section 9 (a) grants [fol. 181] any person aggrieved by an order of the Commission a review thereof in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his place of business. Since no stay was granted by this court pursuant to Sec. 9 (b) of the Securities Act, the Commission, on July 3, 1935, filed a petition

in the District Court for the Southern District of New York, pursuant to Sec. 22 (b) of the Act (48 Stat. 86; 15 U. S. C. Sec. 77v), for an order directing the appellant to appear and testify before an officer of the Commission pursuant to a subpoena which the Commission had previously served on the appellant and which he had failed to obey. The appellant appeared in opposition to this petition; a hearing was had and the court granted the order directing the appellant to appear and testify in the matter of the registration statement he had filed. The respondent therein named appealed to this court. The two causes have been consolidated.

The appellee moves to dismiss the petition to review urging that no order has been entered which the petitioner might review in this court. The orders of the Commission referred to are to be found in Secs. 8 (b), 8 (d) and 8 (e), all preceding Sec. 9, which provides for a review of the orders. Section 8 (b) authorized an order refusing to permit a registration statement to become effective until it has been amended as required in the order. Sections 8 (d) and 8 (e) provide for the entry of a stop order suspending the effectiveness of the registration statement at any time. Notice of hearings and proceedings under these sections must be given and the Commission must make a final determination of fact before such orders may be entered. They would then become final orders of the Commission. The order sought here to be reviewed is not of either type. It [fol. 182] is an interlocutory ruling in the proceeding and hearing which was within the control of the Commission as a tribunal until some final determination was made. Interlocutory orders of a court are not receivable except where it has been provided by statutory authority. Illustrations of this is the jurisdiction of this court provided for by Sec. 128 of the Judicial Code (28 U. S. C. 225) which provides that the Circuit Court of Appeals may review only final decisions of the district court and certain enumerated interlocutory orders or decrees granting, refusing or modifying interlocutory injunctions and receiverships or involving extraordinary relief. *Herrup* v. *Stoneham,* 15

Fed. 2, 49 C. C. A. 2) *France & Canada S. S. Co.* v *French Republic,* 285 Fed. 290 (C. C. A. 2); *Gas & Electric Securities Co.* v. *Manhattan & Queens Traction Corp.,* 266 Fed. 625, 632 (C. C. A. 2). These principles have been applied to interlocutory rulings of administrative tribunals. *Chamber of Commerce of Minneapolis* v. *Fed. Trade Comm.,* 280 Fed. 45 (C. C. A. 8). We do not think that Congress intended by any provision of this act to permit reviews by the Circuit Courts of Appeals of interlocutory and procedural orders entered by the Securities and Exchange Commission.

The stop order hearings authorized by the Act are summary proceedings for the protection of investors against misrepresentation and omissions of a registration statement. We think it is when a final order is entered as a result of the hearings that the act intends the appellant might have a right of review of that determination. No order under Sec. 8 (b) was entered and the registration here became effective May 24th. It remained effective since no stop order was issued under Sec. 8 (d). Under such circumstances the denial of a motion to withdraw the registration reflected no injury upon the appellant. The [fol. 183] motion to dismiss the petition to review is granted.

Appellant appeals from an order directing him to appear and testify before the Commission regarding his registration statement. It was entered pursuant to Sec. 22 (b).

The answer of the appellant sets up the invalidity of the statute on constitutional grounds and also denies jurisdiction of the Commission to make the application after his motion to dismiss. If he could withdraw his registration by mere request, it would end the effect of filing it and there is no authority under Sec. 19 (b) to issue the Commission subpoena and it could not be enforced by order of the district court under Sec. 22 (b).

The appellant contends that the Securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as

it relates to control over the use of the mails, is fully sustained by the cases which have considered the mail fraud statutes. *Badders* v. *United States,* 240 U. S. 391; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *In re Rapier,* 143 U. S. 110; *Ex parte Jackson,* 96 U. S. 727. It is not an unreasonable method of preventing the use of the mails to promote and consummate the sales of misrepresented securities, to require that all securities, before mails are used, must be registered. *Lewis Publishing Co.* v. *Morgan* (229 U. S. 288), upheld the exaction of certain information as a condition precedent to a newpaper's classification as second class matter. Congress clearly had the power to enact the provision excluding securities from the use of the mails unless a true statement describing them was filed in a public office in Washington. The postal power, like all other powers of Congress, is subject to the limitations imposed by the Bill of Rights *(Milwaukee Pub.* v. *Burleson,* 255 U. S. 407, 430; *Burton* v. *United States,* 202 U. S. 344, 371). But admitting such limitation, we think there was sufficient authority for the mail sections of the Securities Act. The claim that the registration requirements violated due process of law is without force. Registration of all securities whether good or bad, required by state blue sky laws have been upheld as no violation of the due process clause. *Hall* v. *Geiger-Jones,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 42 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568. Similar registration required of securities within the jurisdiction of the Federal government would likewise be clear of the inhibitions of due process in the Fifth Amendment. If the act is constitutional so far as it forbids the use of the mails, that is sufficient for our present consideration. Section 26 of the Act contains a provision that the invalidity of one part shall not invalidate the rest.

Another constitutional objection advanced is that there was an unconstitutional delegation of power by Congress in leaving the determination of rules to the Commission. *Schechter Poultry Corp.* v. *United States* (295 U. S. 495) and *Panama Refining Co.* v. *Ryan* (293 U. S. 388) did not decide that any delegation of authority to control details

of administration was void. They expressly recognized that details of a subordinate nature may be supplied by administrative regulations. The delegation of authority to the commission was merely power to supply these necessary flexible details. Since the powers delegated are of this character, they appear to be within the ruling deciding that similar delegation to the Federal Trade Commission was not unlawful. *Avent* v. *United States*, 266 U. S. 127; *Interstate Commerce Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194. The power to make rules regulating registration is very different from that in the case of the *Panama* [fol. 185] *Refining Co.* case, *supra*, where there was "no criterion to govern the President's course," and from that in the *Schechter* case, *supra*, where the delegation was similar. In both these cases, the executive received the power to affect fundamental provisions of the law. This is entirely different from the power which was set up by an administrative mechanism. Further, those cases seem to have held that there was no necessity for the broad delegation of power. Such cannot be said of the Securities Act. See: 1935, 48 Harvard Law Review, 798. We think that Sec. 19 (a) of the Act (48 Stat. 85, 15 U. S. C. 77s) is constitutional.

The action of the Commission in refusing to allow the withdrawal was proper. Section 19 (a) of the statute authorized the Commission to make such rules and regulation as shall be necessary to carry out the provisions of the title. It would seem necessary to the prevention of the use of the facilities of the mail in the promotion of securities about which no responsible information is on file, to deny a desired withdrawal. The commission properly argues that an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective, to withdraw before a stop order was issued and then to submit another statement with slight changes. This would present a real administrative difficulty and for this reason the Commission's Release 47 seems within the authority granted by Section 19 (a). Moreover, the right of the appellant to withdraw his registration may properly be conditioned by

the Commission in view of the public interest. *In re J. R. Palmenberg Sons*, 76 Fed. 2, 935 (C. C. A. 2); *Young* v. *So. Pac.*, 25 Fed. 2, 630 (C. C. A. 2); *American Zylonite Co.* v. *Celluloid Mfg. Co.*, 32 Fed. 809.

The Commission's authority to subpoena the appellant [fol. 186] and compel him to testify seems clear. Appellant advanced the unconstitutionality of the Securities Act and thus a ruling on this is necessary, even though the Commission's denial of the petition to withdraw is not reviewable by us. The appellee's right to the power to subpoena witnesses for examination is based upon Sections 8 (d), 8 (e) and 19 (b). Appellant urges there is an operative distinction between "investigation" as used in Section 19 (b) and "examination" as it is referred to in Secs. 8 (d) and 8 (e) and contends that Sec. 8 (d) and Sec. 8 (e) do not authorize the compulsion of witnesses to attend an examination with any greater sanction than the issuance of a stop order. The distinction between "examination" and "investigation" is not as potent as argued by appellant. Section 22 (b) of the Act authorizing a district court to order the appearance of a contumacious witness, speaks of "examiners" designated by the Commission. If the appellant's contention was sound, those conducting "investigations" would be "examiners" and those conducting "examinations" within Sec. 8 (d) and Sec. 8 (e) would not be "examiners". Moreover, the power granted by Sec. 19 (b) is for an investigation "necessary and proper" for the enforcement of the act. A proceeding under Section 8 (d) is such an investigation. It is a violation of the act for a registrant to include in a registration statement filed with the Commission, an untrue statement of a material fact or an omission of a material fact which should be stated. If such conduct is wilful it is a criminal offense under Sec. 24. The obvious investigation for the purpose of detecting these violations is the hearing provided for in Sec. 8 (d).

The contention that the appellee's only sanction to compel attendance at the hearings is the issuance of a stop order is erroneous. The appellee is authorized to issue

[fol. 187] the stop order if the issuer, or underwriter, refused to cooperate. If this were the limit of the Commissioner's authority, an underwriter could force a stop order which would injure the innocent issuer and there would be no compulsory power over third persons at all since the stop order is authorized only if the issuer or underwriter prove unwilling to cooperate. Yet the appellee is empowered to examine the issuer, underwriter or any other person. A proper conduct of a hearing under Sections 8 (d) and 8 (e), which determines the rights of the parties, requires that the administrative body conducting the hearing, have complete power to compel production of any evidence necessary to the final determination. Only a stop order could have ended the effectiveness of the registration here and the hearing to determine whether to issue one was authorized and the issuance of a subpoena was lawful.

The court below properly directed the appellant's attendance as a witness.

Order affirmed.

Filed Nov. 4, 1935.

APPENDIX B.

[PUBLIC—No. 22—73D CONGRESS]

[H.R. 5480]

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer

or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used.

(5) The term "Commission" means the Federal Trade Commission.

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwrit-

ing of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash

value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common carrier which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

(3) The issuance of a security of a person exchanged by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such

security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

(c) The provisions of this section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of

this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

SEC. 8. (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access

to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use.

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms of prospectuses used in connection with the sale of securities registered under this title.

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the

time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at

the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security.

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless

the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than ten years after the security was bona fide offered to the public.

CONTRARY STIPULATIONS VOID

SEC. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable.

ADDITIONAL REMEDIES

SEC. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Com-

mission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

SEC. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

SEC. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is

not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SCHEDULE A

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash,

securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or, if identic agreements are used, the forms thereof) made with any underwriter, in-

cluding all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing by-laws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and

circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

TITLE II

SECTION 201. For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

SEC. 202. The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and

hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

SEC. 203. The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

SEC. 204. The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care or representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and do all such other things as are incident or conducive to the attainment of the above objects.

SEC. 205. The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

SEC. 206. The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided*, That the board of directors in its discretion may distribute copies gratuitously.

SEC. 207. The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided*, That any charge levied at the time of depositing securities with the Corporation shall not exceed one fifth of 1 per centum of the face value of such securities: *Provided further*, That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Government, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved May 27th 1933.

APPENDIX C.

Document Withdrawing Registration Statement Presented to Securities and Exchange Commission on June 18, 1935.

Mr. Chairman, Representative of the Honorable Commission:—

I caused to be filed with your honorable selves, under date of 4 May, 1935, an application for the registration of Participation Trust Certificates of the J. Edward Jones Royalty Trust, Series "M." I filed this application in genuine purpose directed toward cooperation with the Commission in its commendable endeavors to secure registrations of important offerings of Securities to the public. I did this, although I previously had understood that the J. Edward Jones Royalty Trust had earned exemptions established by rules and regulations promulgated by the Commission and that therefore registration of the Trust was not required.

In the preparation of the statement which was filed, I procured the valued services of an honorable member of the Bar, one of eminent standing and esteem among a substantial profession and in a noted community, the honorable E. J. Lundy, of Oklahoma. Judge Lundy wrote the Indenture Creating the Trust, prepared all the statements made in the registration papers in question, consulted with me after their preparation and advised me that they conformed, in general plan, to the Indentures which have created previous series of the J. Edward Jones Royalty Trust. I approved Judge Lundy's work and executed the documents.

Preliminary to these preparations, I had visited your officers here, seeking *a modus operandi* for the registration of my trust. In conference, I was advised, in the presence of the esteemed Chairman here, Mr. Green, that you had no forms applicable to the registration of a Trust similar to mine but that I could employ your regular Investment Trust forms (some of which then were handed to me for that purpose) and that I should fill out those forms as best I could,

whereupon they would be accepted and, if after study any additional information or data were required by you, I would be given opportunity to supply the deficiencies. I was advised that we could "sit down and work it out."

Although I believe the Commission does, in fact, notify registrants of deficiencies in filings within ten or twelve days after filing has been made, and in view of the conference I had had I expected to be notified before the expiration of the 20 day period allowed by law, I was surprised to receive *my* notification by telegram after business hours on the nineteenth day, the telegram being dated at 5:35 P.M. of that day.

Instead of being allowed an opportunity, as others have enjoyed, to "sit down and work it out" with you, *my* notification advised me of "untrue statements of material facts" and of omissions of "material facts necessary to make the statements therein not misleading," and peremptorily set a date at which I might appear before you in formal hearing to "show cause why a stop order should not be issued suspending the effectiveness" of my registration statement.

I immediately communicated with Judge Lundy, whereupon close study was made of copies of the registration papers and to this day neither of us can discern, by any possible stretch of intelligent imagination, any untrue or misleading statement contained therein. Nevertheless, you have seen fit to issue a press release giving widespread publicity to such references as "untrue" and "misleading" statements which, to my mind, places me severely at damage, in that my Government is, by such release, in effect notifying the public and, of course, my own clientele, that J. Edward Jones is likely to have a "stop order" placed against his Trust.

I believe such practice is subversive of honorable intentions in business, damaging to constructive purpose, undermining of the confidence of business men in Governmental attempts at business regulation, and not capable of serving J. Edward Jones well in the circumstances.

I, therefore, with regret and with distressful feelings, but with respect toward you, now formally withdraw my application for registration of the Participation Trust Certificates of the J. Edward Jones Royalty Trust, Series "M." I do this because of my fear that the business which I founded fifteen years ago and to which I have dedicated the whole of my business career, will be made the object of continual sabotage.

J. EDWARD JONES.

Washington, D. C.
June 18, 1935—

APPENDIX D.

In the Matter of the Registration Statement of J. Edward Jones, File No. 2-1408-1.

Excerpts From Minutes of Proceedings Before Securities and Exchange Commission at Washington, D. C.

PROCEEDINGS OF JUNE 18, 1935.

Examiner Green: Pursuant to the provisions of the Securities Act of 1933, and under an order of the Commission dated May 25, 1935, supplemented by order dated June 5, 1935, the matter of the registration statement of J. Edward Jones, file No. 2-1408-1, now comes on for hearing.

The hearing was originally set for June 6th, and continued until this date on application of the registrant.

Counsel for the registrant and counsel for the Commission will please enter their appearances. Is the registrant present by counsel?

Mr. Fischbach: Yes, sir. I appear for the registrant.

Examiner Green: Is the Commission ready to proceed?

Mr. Cahn: The Commission is ready.

Examiner Green: Is the registrant ready?

Mr. Fischbach: Yes, sir.

Examiner Green: Call your witnesses.

* * *

Mr. Fischbach: I have a statement here from J. Edward Jones, that I should like to read into the record because this proceeding will be very much affected by it.

Mr. Brookhart: Mr. Examiner, the Commission has issued a subpoena for Mr. Jones' appearance at this hearing. I believe counsel has agreed to stipulate that Mr. Jones did receive the subpoena or that it was left on his desk.

Mr. Fischbach: It is so stipulated.

Examiner Green: Is Mr. Jones here?

Mr. Fischbach: He is not in the court room.

Examiner Green: He is in Washington?

Mr. Fischbach: He is.

Examiner Green: Why is he not here in answer to this subpoena?

Mr. Fischbach: This statement will answer that question.

Mr. Burns: I object to reading into the record a statement by Mr. Jones. The Commission has already had a very unhappy experience with Mr. Jones' method of trying cases in the newspapers, and I suspect very strongly this is just another device of his, and I suggest prior to any reading into the record of any statement by Mr. Jones, that you look upon it and consider it from the point of view of its relevancy.

Examiner Green: I think it is important to see the statement, to see whether or not it is material to this inquiry. Of course, this inquiry is directed to the registration statement.

Mr. Fischbach: I think you will find this statement is material to these proceedings. (The counsel here hands paper to the Examiner.)

Examiner Green: (After looking at statement.) Do

you want to insist upon the application to withdraw the registration statement?

Mr. Fischbach: Yes, sir.

Examiner Green: What does the Commission have to say to that?

Mr. Burns: May we have a few minutes to confer?

Examiner Green: Yes.

(After a short interval.)

Examiner Green: Has the Commission decided what they want to do with reference to this application for withdrawal?

Mr. Burns: The Commission, after considering this problem, has determined that on this application they would not exercise the discretion to permit a withdrawal of the registration statement, and would like to state for the record that despite the statement made in the petition of the registrant, that the procedure of not permitting the registration statement to be withdrawn is not unusual, and is in conformity with the established practice of the Commission. *To refuse to permit a registrant to go right up to the guns of a stop order proceedings* and then seek to avoid it without establishing any sound basis for such avoidance.

Mr. Fischbach: Before any comment can be properly made on the record as to the soundness of the position taken by the registrant I think the statement ought to be in the record, and I ask permission of the Examiner to read it into the record.

* * *

Mr. Fischbach: May I offer this in evidence?

* * *

Mr. Burns: I suggest it be marked for identification for the purposes of the record, and be excluded from being introduced in evidence.

* * *

Examiner Green: Let me state this here: This hearing is to determine whether or not the Commission shall issue an order under Section 8(d) of the Securities Act of 1933.

Only those matters which are material to that particular inquiry are competent, and this certainly is not. For that reason I am going to exclude it. Have it marked for identification, and you may take an exception to the ruling, if you wish, but I will not permit it to be read into the record.

Mr. Fischbach: Well, I am entirely governed by the ruling, but I except to it, of course.

* * *

Examiner Green: It will be marked for identification as Registrant's Exhibit No. 1.

(The document referred to was marked "Registrant Exhibit No. 1," Fischbach, Counsel for identification only.)

Examiner Green: I want to say again, Mr. Fischbach, that you have an opportunity to bring Mr. Jones here and you have a right to question him on anything that is material to this inquiry.

Mr. Fischbach: I understand.

Examiner Green: And I will gladly hear it.

Mr. Fischbach: I understand, your honor.

Mr. Cahn: Mr. Examiner——

Mr. Fischbach: Before proceeding will you indulge me for just a few moments time, please?

Mr. Cahn: Yes.

Mr. Fischbach: As counsel for J. Edward Jones, the registrant, I wish to note on the record the formal withdrawing by the registrant of——

Examiner Green: You mean request for withdrawal, do you not?

Mr. Fischbach: Well, I mean, Mr. Examiner, exactly what I said.

Examiner Green: You recognize, of course, that you have no power or authority to withdraw a registration statement without the consent of the Commission.

Mr. Fischbach: Our minds do not meet on the subject, Mr. Examiner, and I wish to note on the record the formal withdrawal by the registrant of the registration statement as signed by the registrant and filed under date

of the 4th of May, 1935, with the Securities and Exchange Commission, identified with this proceeding as file No. 2-1408, and I wish to state with respect to the withdrawal of such registration statement that there is no proceeding before the Examiner.

Examiner Green: With regard to the application of the registrant to withdraw his registration statement, I direct his attention to rule 47 of the Commission which provides, among other things:

> "Any registration statement or amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto."

In view of the rule and regulation of the Commission, and the action of the Commission heretofore taken on your application for withdrawal, I will not permit a withdrawal, and we will proceed.

Mr. Fischbach: May it be noted of record that further proceedings to be had based on the registration statement, it is not my intention nor the intention of my associate, Mr. Toomey, to participate in any of the proceedings and that we wish the record to show formally that although we may be present at some part of the proceeding, that our presence is that of spectators.

Examiner Green: Has the Commission anything to say?

Mr. Burns: In view of the ruling of the Examiner I think comment is unnecessary.

Examiner Green: Very well. The record will show that Mr. Jones is not now appearing by counsel.

APPENDIX E.

Excerpts From Minutes of Proceedings of June 27th, 1935, J. Edward Jones Matter, File No. 2-1408-1.

Examiner Green: Is the Commission ready to proceed in this matter?

Mr. Cahn: We are.

Examiner Green: All right, let the hearing be convened.

Is there any additional testimony to be offered?

Mr. Cahn: I would like to have Mr. J. Edward Jones called as my next witness.

Mr. Fischback: Mr. J. Edward Jones is not here and has no intention of honoring the subpoena served upon him in New York, under date of June 18, 1935, and the basis for his refusing to honor that subpoena is contained in the papers which we now offer for your inspection.

Mr. Cahn: Mr. Examiner, I offer this document in the record.

Examiner Green: Mr. Fischback, is the subpoena here; together with the Marshal's certification?

Mr. Fischback: Yes, we do not deny that the subpoena was properly served.

Examiner Green: This document will be received in evidence as Commission's Exhibit No. 8.

* * *

Mr. Fischback: May the record show that both Mr. Glasser and I are appearing specially and merely for the purpose of presenting to the Commission the various papers that have been tendered to the Commission, at 10:20 o'clock this morning, upon which you have conferred with members of the Commission?

Examiner Green: As I understand it, you gentlemen are appearing as counsel for Mr. Jones personally, and not as counsel for Mr. Jones as Registrant?

Mr. Fischbach: That is correct.

Examiner Green: However, Registrant is not in any way contesting this proceeding, is he?

Mr. Fischbach: Well, we are not contesting the proceeding on its merits but we contend as counsel for Mr. Jones, that there is no proceeding lawfully pending before the Commission, and we raise the same contention that I raised on the 18th of June, before this Honorable body, that upon the withdrawal of the Registration Statement identified with the proceedings which the Commission appeared to be taking, that the withdrawal of such Registration Statement has completely terminated the power of the Commission in that connection.

Examiner Green: The Examiner has ruled upon that question, and my ruling is the same now, as before.

Is there anything else?

Mr. Fischbach: Yes, I should like to have your permission to offer the originals of the papers which were tendered to counsel for the Commission.

Examiner Green: I understand that they are motions made in the proceedings?

Mr. Fischbach: Yes.

Mr. Cahn: Mr. Examiner, I do not believe that the procedure which Mr. Fischbach offers is proper in this case. The Commission has provided rules for the submission of papers of that sort, and I think that counsel for Mr. Jones should follow those rules and give the Commission an opportunity to examine those papers.

Mr. Fischbach: I understood that the purpose of the recess of over half an hour was to give the Commission and Commission members an opportunity to examine the papers and confer about them.

Mr. Cahn: That may be, but, nevertheless, I do not believe it was proper to submit papers in a hearing of this kind in that manner.

Mr. Fischbach: Do I understand that your objection is that the Commission has not had an opportunity to examine them?

Mr. Cahn: My objection is that those papers were not offered in the proper manner.

Examiner Green: What rule do you refer to, Mr. Cahn?

Mr. Cahn: I refer to Release 47.

Examiner Green: Will you show me that, please?

Mr. Cahn: Yes—I will have one here in just a minute, Mr. Examiner.

(At this point Mr. Cahn advanced to the bench and commenced to whisper in the Examiner's ear.)

Mr. Fischbach: I would like to know, Mr. Examiner, whether Mr. Cahn is now addressing you on any matter concerning this proceeding, and, if he is, I believe it should be on the record.

• • •

(With which statement of registrant's counsel the Examiner agreed.)

Note—The Reporters failed to indicate the occasion of Mr. Fischbach's statement and the record is corrected accordingly.

• • •

Examiner Green: The practical effect of these motions is to dismiss the proceedings. I think that counsel has the right to make such motions. I think the form may be considered and passed upon, and they may be allowed or overruled.

• • •

Mr. Fischbach: I present to your Honor the motion for the dismissal of the Registration Statement and proceedings of J. Edward Jones, in this proceeding, identified as File 2-1408.

Examiner Green: That motion will be overruled.

Mr. Fischbach: Exception, please.

Examiner Green: I might state that the basis for my ruling on that motion is the same as in the case of your former motion to withdraw the statement.

Mr. Fischbach: Now, I present to your Honor a mo-

tion to dismiss this proceeding, subscribed and sworn to by J. Edward Jones, on June 26, 1935, in which motion we ask that this Commission—

Examiner Green (Interposing): There is no need to read or state the substance of that; I have the motion before me. Let the record show that it is overruled, for the same reason.

Mr. Fischback: Exception.

I now present to your honor a motion to quash the subpoena issued by your Honor as an officer of the Commission, on the 18th of June, 1935.

Examiner Green: I have the motion before me. Let the record show that it is overruled.

Mr. Fischbach: Exception.

I now present a written statement of the objection to the jurisdiction of this Commission and a motion in regard to the jurisdiction of this Commission to entertain this proceeding.

Mr. Cahn: Just a minute. Let me examine that one again, please?

Mr. Fischbach: Yes. (Handing document to counsel for the Commission.)

Mr. Cahn: Is this filed by J. Edward Jones?

Mr. Fischbach: Yes, filed by J. Edward Jones and his counsel, as indicated.

Mr. Cahn: I think I will object to this statement, Mr. Examiner, on the ground that it is not properly qualified. This is apparently an effort to get into the record a statement by Mr. J. Edward Jones, and, as such, is hearsay, inasmuch as Mr. J. Edward Jones is not here and not subject to cross examination as to the facts in this statement.

Examiner Green: Let me see that statement, please?

Mr. Cahn: Yes, sir. (Handing document to the Examiner.)

Examiner Green: What particular section of this do you refer to, Mr. Cahn?

Mr. Cahn: I refer particularly to Section E.

Examiner Green: Is that a question of fact or a question of law?

Mr. Cahn: I think it is a question of fact and this (indicated part of the document) is really a mixed question of law and of fact, I think, Mr. Examiner.

Mr. Fischbach: I think that that is a proper allegation of an ultimate fact, sufficiently pleaded, your Honor, without any evidence to support the statement.

Examiner Green: The question that is worrying me is that it may be a self-serving declaration on the part of J. Edward Jones, and he is not here to be cross-examined as to the statements. Of course, Mr. Jones cannot come in here and make some statement of fact without permitting himself to be subjected to cross examination.

Mr. Glasser: Of course, he challenges the jurisdiction of the court in its entirety, and it is not a question of fact, but a question of law.

Examiner Green: I understand that, but, in this motion, I understand that Mr. Jones states that he is not engaged in interstate commerce.

Mr. Glasser: That is the question of law. The Registration Statement which is before your Honor recites the circumstances under which he is doing business. Now, on the Registration Statement, we say that he is not under the jurisdiction of this Commission.

Mr. Cahn: I do not think that counsel can point to any part of the law which supports his statement as to the business.

Mr. Glasser: The statement points out the way of his doing business.

Mr. Cahn: The mere fact that he filed his Registration Statement shows that he thought at one time that he was engaged in interstate commerce.

Mr. Glasser: Whatever he thought at that time, he now has the right to challenge the jurisdiction of this Com-

mission, as a question of law, and we are merely proceeding to challenge the legal question.

* * *

Examiner Green: We can say that this motion is in the nature of a pleading, although I think it contains an allegation of fact. May the motion not be received, and may not the question of whether there is any statement of fact, or not, therein, be considered in determining whether or not the motion should be overruled?

* * *

Mr. Glasser: I merely want to make the further observation, Mr. Examiner, that subsection G, in substance, states that the sale of units of securities, without ownership in New York, or any other State, of oil production in Oklahoma, is not interstate business. The courts will take judicial notice of the fact that there is not any oil being produced in New York or Connecticut, and we say here that the sale of units of securities in New York, of production in Oklahoma, is not an interstate business.

Mr. Flynn: This is purely a statement of fact, unsupported by Mr. Jones, and I suppose it could go in for what it is worth, but the statement also states that the business of J. Edward Jones is in the selling of units of securities in New York and Oklahoma, and if the units are not such units of oil production in New York and Oklahoma, but, rather, trust certificates of a trust which, in turn, owns ownership of oil——

Examiner Green: (Interposing.) Is not that a fact which should be shown by evidence?

Mr. Glasser: Yes.

Examiner Green: No pleading of that is here. I think the statement may be received, but I think it should be overruled, because it contains allegations of fact and no evidence is offered to support them.

Mr. Glasser: May I have an exception?

Examiner Green: Yes.

Mr. Glasser: Would the Examiner object to the addition of the words "overruled and denied?"

Examiner Green: Overruled and denied.

Mr. Flynn: Mr. Examiner, am I to understand that, in that ruling, you are making any statement that Mr. Jones is not engaged in that type of business?

Examiner Green: Oh no, that will have to be sustained by the record.

Mr. Flynn: And the ruling implies no assertion by the Commission of any jurisdiction for registration purposes over any individual engaged purely in an intrastate business; is that correct?

Examiner Green: The motion was received simply for the reason that the Examiner is of the opinion that the counsel for Registrant has no right to dismiss the proceeding. I understand that the motion speaks for itself, but I think we have to consider the evidence as much as the motion.

Mr. Fischbach: May I call upon counsel for the Commission to indicate whether they would like to have further copies of the motion presented?

Mr. Cahn: I believe we have sufficient copies.

Counsel, of course, understands, Mr. Examiner, that the rulings here made are rulings which can be argued before the Commission?

Mr. Glasser: Yes.

Examiner Green: Let the record show that counsel for the Commission accepts my act.

Mr. Glasser: Let the record show that we waive any argument to the Commission.

Examiner Green: Is there anything else to be offered?

Mr. Fischbach: We should like to withdraw, without any indication——.

Mr. Cahn: Mr. Examiner, in view of the fact that Mr. Jones has not appeared, I request an adjournment until such time as the Commission may, by proceedings to be instituted, compel the appearance of Mr. Jones in this hearing being held before the Commission.

Mr. Glasser: To which request Mr. Jones enters his

objection, on the ground that the Commission is without authority to make any such request.

Mr. Cahn: The adjournment is asked for because of the failure of the Registrant to present his appearance and the Commission expects to use its power, under the Act, in a proper court, to compel the appearance of Mr. Jones.

Mr. Glasser: We have no objection to that, but we think that the Commission's hearing should be adjourned without such statements being made.

Examiner Green: You are asking for a continuance, I understand?

Mr. Cahn: Yes.

Examiner Green: In the event that the Commission does undertake some steps to compel Mr. Jones' appearance, the record will have to be held open until that time. I want the record to show that Mr. Jones was duly served with subpoena to appear and to testify in these proceedings and that he has failed to cooperate with the Commission and appear, and has refused to be examined in connection with the Registration Statement filed by him.

Do you suggest any time for the continued hearing?

Mr. Cahn: No, I have no suggestion, Mr. Examiner. We are going to proceed in the matter as promptly as possible.

Examiner Green: Let the hearing be continued indefinitely, with the understanding that counsel for Registrant will be notified in advance of any hearing.

Mr. Glasser: We desire to say that we intend to take some action in court, and we will be courteous enough to give counsel for the Commission notice of any action on our part.

Examiner Green: I mean that a continuance of this proceeding, the date of such continuance, shall be given to the Registrant and his counsel.

Let the record show that the Examiner has requested counsel for the Commission to submit a brief of their intentions with respect to this situation.

Mr. Cahn: Yes, sir.

Examiner Green: And that may be submitted within ten days. Copy of it will not be submitted to the Registrant, because he has not appeared here.

(Thereupon, at 11:30 o'clock a.m., the hearing in the above-entitled cause was accordingly adjourned indefinitely.)

APPENDIX F.

Assignment of Errors.

1. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission to which an order to appear and testify could attach.

2. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission on the 18th day of June, 1935, out of or in aid of which the Commission was empowered to issue a subpoena.

3. The Court erred in ruling that there was a proceeding pending before the Securities and Exchange Commission in aid of which it could entertain an application under the provisions of Section 22-b of the Securities Act of 1933 as amended.

4. The Court erred in ruling that the registration statement of J. Edward Jones had become effective on May 24, 1935.

5. The Court erred in ruling that the registration statement of the respondent now continues to be effective.

6. The Court erred in ruling that the withdrawal of said registration statement which occurred on June 18, 1935, did not terminate the proceedings then pending before the Securities and Exchange Commission.

7. The Court erred in ruling that the subpoena issued on the 18th day of June, 1935, had any legal force or efficacy.

8. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Securities and Exchange Commission was empowered to have the respondent attend before it as a witness.

9. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Commission's powers in the premises extended beyond affording an opportunity for hearing.

10. The Court erred in refusing to rule that under the provisions of the Securities Act of 1933, as amended, it is entirely optional with a registrant to determine whether he should take advantage of the opportunity for hearing therein prescribed or, at his discretion, submit to a stop order without a hearing.

11. The Court erred in ruling that the sufficiency of the petition of the applicant should not be determined by the same standards and requirements applicable to all other pleadings in the District Court.

12. The Court erred in ruling that it had jurisdiction to entertain the application under the provisions of Section 22-b of the Securities Act of 1933, as amended, in the face of the pending petition for review in the Circuit Court of Appeals of the Second Circuit.

13. The Court erred in ruling that it had jurisdiction to entertain the application lodged before it in view of the pendency in the Circuit Court of Appeals for the Second Circuit of a petition to review the identical questions.

14. The Court erred in ruling that the institution of proceedings in the Circuit Court of Appeals for the Sec-

ond Circuit, pursuant to the provisions of Section 9-a of the Securities Act as amended, did not divest the District Court of jurisdiction to hear and determine the identical questions.

15. That in interpreting the questions raised concerning the validity and constitutionality of certain provisions of the Securities Act of 1933, the Court erred in ruling that such act should be construed so as to bring the enactment thereof within the powers of Congress.

16. The Court erred in ruling that all doubts as to the constitutionality of the Securities Act of 1933, as amended, by which act the civil and criminal liability of citizens was drastically enlarged, must be resolved in favor of constitutionality.

17. The Court erred in ruling that Congress, in the exercise of that power conferred upon it by Section 8, Clauses 3, 7 and 18 of the Constitution of the United States, had the authority to enact Section 5 of the Securities Act of 1933, as amended.

18. The Court erred in ruling that the enactment of the Securities Act of 1933 was a proper legislative function of Congress and a proper exercise of the powers granted it under the Constitution.

19. The Court erred in refusing to rule that the Securities and Exchange Commission had no legal existence and was not lawfully created.

20. The Court erred in refusing to rule that the process of the Securities and Exchange Commission was void and without legal efficacy.

21. The Court erred in refusing to rule that the Securities Act of 1933 as amended was unconstitutional and void by reason of being violative of and repugnant to pro-

visions of the 4th, 5th, 9th, 10th and 14th amendments to the Constitution of the United States.

22. The Court erred in refusing to rule that the Securities Act of 1933 was void as an attempted delegation of legislative power to the Securities and Exchange Commission and therefore violative of and repugnant to the provisions of the 4th, 5th and 9th amendments to the Constitution of the United States.

23. The Court erred in refusing to rule that the Securities Act of 1933 as amended is unconstitutional and void by reason of such legislation being an attempt to usurp powers reserved to the respective states and the people thereof by the 10th amendment to the Constitution of the United States.

24. The Court erred in refusing to rule that the activities of the respondent in the sale in New York and elsewhere of units of ownership in oil production in the State of Oklahoma are not subject to regulation by the Federal Government.

25. The Court erred in refusing to rule that the business of the respondent is not a business involving a public offering of securities in interstate commerce within the regulatory control of the Federal Government.

26. The Court erred in ruling that the Securities and Exchange Commission had power to enact, "release" or "rule" 47 and erred in failing to rule that such power, if vested in the Commission by the terms of the Act is void as a prohibited delegation of legislative powers.

27. The Court erred in ruling that Rule 47 was validly enacted.

28. The Court erred in ruling that the Securities and

Exchange Commission had acted validly under the provisions of Rule 47.

29. The Court erred in ruling that the Securities and Exchange Commission had the authority under the provisions of Rule 47 to refuse the respondent the right to withdraw a registration statement previously filed by him.

30. The Court erred in failing to rule that Rule 47 had no force or legal effect by reason of it having been adopted contrary to and in violation of the provisions of Section 19-a of the Securities Act of 1933 as amended.

31. The Court erred in refusing to rule that the action of the Securities and Exchange Commission under and pursuant to the provisions of Rule 47 in denying the respondent the right to withdraw a registration statement previously filed by him was arbitrary and void and violative of the plain language of said rule.

32. The Court erred in refusing to rule that the denial by said Securities and Exchange Commission of the respondent's right to withdraw the registration statement previously filed by him was void by reason of being discriminatory as well as arbitrary.

33. The Court erred in ruling that it was within the power of Congress to delegate to an administrative tribunal the power to enact regulations having the force of law and subjecting persons guilty of a violation of such regulations to penal fine, imprisonment and penal servitude.

34. The Court erred in ruling that the right of the respondent to withdraw the registration statement previously filed by him was not absolute in the absence of a showing on the record that the public interest and the protection of investors otherwise required.

35. The Court erred in refusing to rule that the pro-

ceedings of the Securities and Exchange Commission conducted by one of its attorneys did not deprive the respondent of due process of law.

36. The Court erred in refusing to rule that proceedings of the Securities and Exchange Commission conducted by one of its attorneys were illegal and improper by reason thereof.

37. The Court erred in refusing to rule that the proceedings of the Securities and Exchange Commission subsequent to June 18, 1935, were illegal and improper by reason of the withdrawal of the registration statement on said date.

38. The Court erred in ruling that the Securities and Exchange Commission had jurisdiction over the subject matter of the business of the respondent.

39. The Court erred in refusing to rule that oil royalties and interests in oil and gas production are interests in realty and not securities.

40. The Court erred in ruling that oil royalties and interests in oil and gas production are securities subject to regulation by the Federal Government.

41. The Court erred in refusing to rule that the definition of the term "security", as including oil royalties or fractional undivided interests in oil, gas or other mineral rights contained in Section 2, subdivision 1 of the Securities Act of 1933 as amended, is contrary to the positive law of oil producing states and therefore beyond the power of Congress to so declare.

42. The Court erred in failing to rule that the Securities and Exchange Commission had an adequate statutory remedy at law by reason of being able in the state of the

record before it to enter a stop order, the existence of which remedy precluded the intervention of equity.

43. The Court erred in refusing to rule that the course of conduct being pursued by the Securities and Exchange Commission in the cause at bar was contrary to the standards stated by Mr. Justice HOLMES in

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298.

44. The Court erred in ruling that the objections of the respondent to the course of action being pursued by the Securities and Exchange Commission were premature.

45. The Court erred in granting the applicant's motion and in entering its order accordingly.

—

The petitioner will rely upon the following numbered of the above-quoted assignments of errors, to-wit: 1, 2, 3, 4, 7, 8, 9, 10, 11, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

APPENDIX G.

Release No. 5 of the Securities and Exchange Commission.

FOR IMMEDIATE RELEASE, Thursday July 6, 1933.

Securities Act of 1933

Release No. 5

The Federal Trade Commission today approved the rules, regulations and form for administration of the Securities Act of 1933, copies of which are available upon application.

In approving the rules the Commission had regard for the public interest and for the protection of investors, but endeavored to place no undue burden either upon general business or upon honest and reputable investment dealers.

The act prohibits the filing of a statement prior to July 7 and requires that it be on file at least twenty days before a security may be sold under the act. Realizing that many issuing companies distantly situated from Washington have been unable to obtain forms and prepare the statements required on July 7, the Commission promulgated a rule providing that such companies might file in such form as they might reasonably consider to be in compliance with the act, "provided that an amendment to such registration statement shall be filed at least ten days prior to the effective date, in the required form prescribed by the Commission and shall contain full, accurate and complete information in respect of each item thereof."

Registration statements as received, with all information contained therein, will be available for public inspection at the Commission's offices in Washington. Photostatic or typewritten copies will be furnished at a nominal sum per page.

Registration statements and all other papers required therewith are to be filed in triplicate, the date on which they are actually received to be the date of the filing thereof.

The maximum aggregate price at which securities are proposed to be offered is to be stated, and payment is to be made of registration fee of one one-hundredeth of one per centum based upon such price, the fee not to be less than $25.

Five copies of the form of advertising prospectus proposed to be issued with reference to a security shall be filed along with the registration statement. The Commission is to be notified of the price and date to be inserted in the prospectus prior to the date of the public offering.

RADIO BROADCASTS MUST BE SUBMITTED IN WRITING IN ADVANCE.

Where a prospectus consists of a radio broadcast it shall be reduced to writing, five copies of which shall be filed with the Commission at least five days before the matter is to be broadcast or otherwise issued to the public.

There shall be inserted in a conspicuous part of advertising prospectuses, a statement the language of which is prescribed by the Commission, showing that "neither the fact that such registration has been filed with the Commission, nor the issuance of this prospectus under the rules or regulations prescribed, shall be deemed a finding by the Commission that this prospectus is true and accurate on its face, or omits to state a material fact or to mean that the Commission has in any way passed upon the merits of, or given approval to, such prospectus or the security mentioned therein."

RULES AND REGULATIONS APPLY ONLY TO TITLE I OF THE ACT.

The rules and regulations as approved today apply only to Title I of the act which provides for regulation of securities, particularly the registration thereof. No reference is made to Title II, the "Corporation of Foreign Bondholders Act, 1933," which is not to take effect until the President finds "that its taking effect is in the public interest and by proclamation so declares." The effective date is July 27.

The Commission desires to point out that most of the rules and regulations are explicitly required by the Securities Act. In some matters the Commission has discretion, and the rules and regulations in relation thereto are experimental pending actual working experience with the new Securities Act, and will be subject to revision from time to time as experience proves the advisability of changes.

APPENDIX H.

Release No. 47 of the Securities and Exchange Commission.

FOR IMMEDIATE RELEASE Friday,
September 22, 1933.

FEDERAL TRADE COMMISSION
Washington

SECURITIES ACT OF 1933
Release No. 47

The Federal Trade Commission announces adoption of a rule under the Securities Act conferring certain powers upon the person who is designated in each registration statement as authorized to receive all communications from the Commission concerning the security issue filed for registration.

According to the new ruling, such person shall have power to amend the registration statement by altering to a subsequent date the date of the proposed offering of the securities registered; power to withdraw the registration statement or amendments thereto; and power to consent to entry of an order by the Commission prior to effective date of the registration refusing to permit the registration statement to become effective until it has been amended in accordance with the order.

A consent order entered by the Commission under this ruling is to be "Without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate * * *."

Accompanying the rule is an explanatory note covering the arbitrary delaying of the proposed date of offering of a security in instances where the registration statement is incomplete or inaccurate but "can be corrected with ease by an amendment." The purpose is to permit of a method whereby an extension of 20 days can be afforded a registrant so as to allow him, without threat of stop order proceedings,

time to make and file the necessary amendments. The procedure is designed with the idea of permitting the Commission not to make a record against a registrant who, the Commission has reason to believe, is ready to conform to the act. Under this procedure the Commission can afford him sufficient time to make his registration statement conform to the act, at the same time preventing him from selling securities until the necessary amendments shall have been made.

Other rules adopted by the Commission pertain to *(1)* the withdrawal of a registration statement or an amendment thereto, *(2)* amendments filed pursuant to an order of the Commission, *(3)* a definition of "distribution" as used in Section 2 (11) of the act, and *(4)* the incorporation by reference of exhibits filed with previous registration statements. The purpose of the last named rule is merely to facilitate the second and subsequent registrations, and to avoid a filing of unnecessary exhibits with such registrations.

Full text of the new rules is as follows:

AMENDMENTS FILED PURSUANT TO AN ORDER OF THE COMMISSION.

An amendment made prior to the effective date of the registration statement shall be deemed to have been made pursuant to an order of the Commission within the meaning of Section 8(a) of the Securities Act so as to be treated as part of the registration statement only when the Commission shall after the filing of such amendment find that it has been filed pursuant to its order.

WITHDRAWAL OF REGISTRATION STATEMENT OR AMENDMENT THERETO.

Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration

statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

CONFERRING OF POWERS OF AMENDMENT, WITHDRAWAL AND ENTRY OF CONSENT ORDER.

(1) All registrants shall hereafter confer upon the person designated in the registration statement as the person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration statement,

(a) a power to amend the registration statement by altering to a subsequent date of the proposed offering of the securities for which the registration statement is filed; and

(b) a power to withdraw the registration statement or all amendments thereto, or an amendment made by virtue of the power conferred in paragraph (a) above; and

(c) a power to consent to the entry of an order issued under Section 8(b) of the Securities Act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

(2) The naming of a person in accordance with the forms promulgated by the Commission as a person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration state-

ment, shall be deemed also, unless there is an express statement to the contrary, as an authorization by the registrant of the person so named as having the powers specified in paragraph (1) of this rule.

EXPLANATORY NOTES. The Commission upon finding that a registration statement is on its face incomplete or inaccurate or includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, but also finding that such incompleteness, inaccuracy, untruth or omission can be corrected with ease by an amendment, and recognizing that the case is not one that requires immediate steps to be taken to issue an order under Section 8(b) or 8(d) of the Securities Act, but recognizing that it is desirous that no securities for which such registration statement is filed should be legally sold until the necessary amendments shall have been made, may thereupon request the person referred to in the above rule to file an amendment prior to the effective date of the registration statement delaying the proposed date of the offering of the securities for which the registration statement is filed. Such amendment, which may under the above rule be filed by the person named in the above rule, if filed prior to the effective date of the registration statement, will under Section 8(a) of the Securities Act automatically delay the effective date of the registration statement for twenty days after the filing of such amendment, until and unless some further action is taken by the Commission. The other necessary amendments properly executed may thereafter be forthcoming. Upon their filing the Commission can consent to such filing, with due regard to the public interest and the protection of investors, thereby making such amendments part of the registration statement. Such a procedure does not necessitate delaying the original effective date of the registration statement, if the amendments are duly executed and filed prior to such date. At most, it necessitates a delay in the date of offering the security for one day, and even this

day may be eliminated by requesting the withdrawal of the amendment first filed. This procedure permits delaying the coming of an effective date when the registration statement unless amended is inaccurate or incomplete. At the same time it afford a registrant the opportunity to amend without having initiated against him proceedings looking forward to the issuance of an order under Section 8(b) or 8(d). Lack of cooperation on the part of a registrant by failing promptly to make the necessary amendment will require the Commission to initiate proceedings looking forward to the issuance of an order under Section 8(b) or 8(d).

A registrant may seek to avoid the making of such an amendment or the initiation of proceedings looking forward to the issuance of an order under Section 8(b) or 8(d) by requesting that his registration statement be withdrawn or by requesting that an order of the type specified in paragraph 1(c) of the rule above be entered.

INCORPORATION BY REFERENCE OF EXHIBITS FILED WITH PREVIOUS REGISTRATION STATEMENTS.

The issuer of a security for which a registration statement is in effect may, in filing a subsequent registration statement, incorporate by specific reference such exhibits or parts thereof, which may have been filed with any of its previous registration statements, as it may choose. If the inclusion of additional items would be necessary to make such a reference complete, the issuer will be deemed to have complied with the requirement if, along with the reference, it also files such additional items. If alterations have taken place in any document, a copy of which was filed as an exhibit with a previous registration statement, the copy so filed may be incorporated by reference, if the issuer files along with the reference a statement indicating all deletions, and containing the text of all substitutions and additions, and stating the date or dates on which such changes took effect. The Commission, however, may refuse to recognize any incorporation by reference in any case where

in the opinion of the Commission such incorporation by reference is unclear or confusing.

DISTRIBUTION UNDER SECTION 2 (11) DEFINED TO INCLUDE CERTAIN ACTIVITIES.

A person, the chief part of the business of which consists in the purchase of the securities of any one issuer, its subsidiary and/or affiliate and in the sale of its own securities to furnish the proceeds with which to acquire the securities of such issuer, subsidiary and/or affiliate, is to be regarded as engaged in the distribution of the securities of such issuer, subsidiary and/or affiliate within the meaning of Section 2 (11).

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Nos. 639, 640

In the Supreme Court of the United States

OCTOBER TERM, 1935

J. EDWARD JONES, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (No. 640, R. 154–164) is reported in 12 F. Supp. 210 and the opinion of the Circuit Court of Appeals (No. 639, R. 185–191; No. 640, R. 179–185) is reported in 79 F. (2d) 617.

JURISDICTION

The decrees sought to be reviewed were entered November 12, 1935 (No. 639, R. 191; No. 640, R. 185–186). A petition for rehearing was filed with the Circuit Court of Appeals November 18, 1935,

and was denied by that court November 21, 1935 (No. 639, R. 192–193; No. 640, R. 186–187). Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

IN NO. 639

1. Whether the interlocutory rulings of the Commission denying the motions of Jones to withdraw his registration statement were reviewable by the Circuit Court of Appeals.

IN NO. 640

2. Whether Jones had a right to withdraw his registration statement.

3. Whether the Securities Act of 1933 authorized the Commission to apply for an order directing Jones to testify concerning his registration statement.

4. Whether the registration requirements of the Securities Act of 1933 are a valid exercise of the powers granted to Congress by the United States Constitution.

STATUTE AND REGULATION INVOLVED

A copy of the Securities Act of 1933, together with the amendments, is attached hereto, and the only regulation of the Commission involved herein is set forth in the Appendix.

STATEMENT

J. Edward Jones, the petitioner, on May 4, 1935, filed a registration statement with the Securities and Exchange Commission on the Commission's Form C–1, pursuant to Section 6 of the Securities Act of 1933, Act of May 27, 1933, c. 38, 48 Stat. 78 (U. S. C., Title 15, Sec. 77 (f)). The registration statement, which is reprinted in full in both records (No. 639, R. 9–89; No. 640, R. 52–132) covered an issue of "Participation Trust Certificates in Producing Oil Royalties", known as "J. Edward Jones Royalty Trust, Series M."

It appeared to the Commission that this registration statement included untrue statements of material facts required to be stated therein and omitted to state material facts necessary to make the statements therein not misleading. The Commission therefore on May 20, 1935, directed that stop-order proceedings be instituted (No. 639, R. 109). Notice was sent to Jones by telegram on May 23rd (No. 639, R. 90–91; No. 640, R. 133–134), and confirmed by letter on May 24th (No. 640, R. 19, 33), that a hearing would be held on June 6th, at which time he might appear and show cause why a stop order should not be issued by the Commission suspending the effectiveness of the registration statement (No. 639, R. 90–91; No. 640, R. 133–134). By agreement of counsel, the hearing was postponed to June 18, 1935 (No. 639, R. 112, 166–167).

Pending this hearing, Jones's registration statement became effective by operation of law on May 24th,[1] twenty days after the date of filing, pursuant to the provisions of Section 8 (a) of the Act of May 27, 1933, c. 38, 48 Stat. 79 (U. S. C., Title 15, Sec. 77 (h)). On June 13th George C. Mathews, a Commissioner of the Securities and Exchange Commission, issued a subpena duces tecum directing Jones to appear on June 18th before an officer of the Commission designated to conduct the hearing and to bring with him certain papers (No. 639, R. 91–92; No. 640, R. 134–135). Jones failed to appear at the hearing on June 18th, although his counsel appeared and stipulated that Jones had received the subpena (No. 639, R. 117).

At this examination and hearing held on June 18th, counsel for Jones attempted to withdraw the registration statement by making an oral statement at the hearing (No. 639, R. 121) and by filing a statement written by Jones (No. 639, R. 117–119, 176–179). Permission to withdraw the registration statement was refused by the officer conducting the hearing (No. 639, R. 122) and by an appropriate minute of the Commission (No. 639, R. 180).

After taking some testimony, the officer conducting the hearing adjourned it until June 27th (No.

[1] The implication in Jones' Petition for Writs of Certiorari, p. 2, that an order to show cause why there should not be issued a stop order suspending the effectiveness of a registration statement, *ipso facto* prevents the statement becoming effective, is manifestly erroneous.

639, R. 151). On June 16th this officer, pursuant to the power granted him by an order of the Commission (No. 639, R. 113–114; No. 640, R. 19–21), issued a subpena directing Jones to appear before said officer on June 27th to testify regarding his registration statement (No. 639, R. 99; No. 640, R. 142). This subpena was duly and personally served upon Jones by a United States Marshal on June 20, 1935, in the City of New York (No. 639, R. 176), and the service was admitted by Jones (No. 639, R. 152; No. 640, R. 34). Jones again failed to appear at the adjourned hearing on June 27th and, through his counsel appearing specially, refused to obey the subpena (No. 639, R. 152).

At the same hearing, counsel for Jones presented successively a dismissal of the registration statement (No. 639, R. 100–101; No. 640, R. 143–144), a motion to dismiss the registration statement (No. 639, R. 101–103; No. 640, R. 144–146), a motion to quash the subpena served upon Jones (No. 639, R. 103–105; No. 640, R. 146–148), and an objection to jurisdiction (No. 639, R. 105–108; No. 640, R. 148–151). All of the motions were denied, and the objection to jurisdiction was overruled by the officer conducting the hearing (No. 639, R. 157, 158, 162) and by appropriate minutes of the Commission (No. 639, R. 180–181).

In making these several rulings on June 27th, and in refusing Jones permission to withdraw his registration statement on June 18th, the Commission and the officer conducting the hearing acted

under authority of a regulation of the Commission which was published in Release No. 47 on September 22, 1933. The pertinent part of the regulation (No. 639, R. 92–98; No. 640, R. 135–141) provided:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto * * *. Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

On June 28, 1935, Jones filed in the Circuit Court of Appeals for the Second Circuit a petition for review of the action of the Commission in refusing to permit the withdrawal of the registration statement, in denying the several motions presented at the hearing, and in overruling the objection to jurisdiction (No. 639, R. 2–8). The Circuit Court of Appeals entered a decree dismissing the petition for review (No. 639, R. 191) on the ground that it had no jurisdiction under Section 9 of the Securities Act of 1933, Act of May 27, 1933, c. 38, 48 Stat. 80 (U. S. C., Title 15, Sec. 77 (i): first, because no order was entered (No. 639, R. 186–187, f. 188) by the Commission, and, second, because, the proceedings before the Commission having "reflected no injury upon" (No. 639, R. 187, f. 188) Jones, he was not a "person aggrieved." This decree of the Circuit Court of Appeals is the one sought to be reviewed by the petition for a writ of certiorari in No. 639.

Between the time Jones filed his petition for review and the time the Circuit Court of Appeals dismissed this petition, the Commission (not having been stayed by any order pursuant to Section 9 (b) of the Securities Act of 1933) filed in the District Court of the United States for the Southern District of New York an application pursuant to Section 22 (b) of the Securities Act. This application (No. 640, R. 3–24) sought an order of the District Court directing Jones to appear before the Commission, or one of its examiners designated by it, "to testify in the matter of the registration statement of J. Edward Jones and to give answer to any and all pertinent questions regarding the information and documents heretofore filed by the respondent [Jones] with the Commission upon the said registration statement" (No. 640, R. 22–23).

In response to a rule to show cause why this application should not be granted (No. 640, R. 25–26), Jones appeared and filed an answer (No. 640, R. 26–44).

After hearing argument and considering briefs, the District Court on August 12, 1935, rendered an opinion (No. 640, R. 154–164) holding that the Commission was authorized under the Securities Act of 1933, as amended, and under the regulation published in Release No. 47, to continue the proceedings in which Jones had been summoned to testify and to deny Jones's motions to dismiss his registration statement; and further holding that the

provisions of the Securities Act were a valid exercise of the powers of Congress over "commerce with foreign nations and among the several states" and over "post offices and post roads." Accordingly, on August 23, 1935, the District Court issued an order granting the Commission's application, quoted *supra* (No. 640, R. 152–153).

From this order Jones appealed to the Circuit Court of Appeals for the Second Circuit (No. 640, R. 165–166). That court consolidated only for the purpose of argument this appeal and the original proceedings on the petition for review, already described; and rendered an opinion (No. 639, R. 184–191; No. 640, R. 179–185) holding that the Securities Act of 1933 and the regulation published in Release No. 47 authorized the Commission to continue its proceedings and issue a subpena in aid thereof, and that the registration requirements of the Act were a valid exercise of the power of Congress "to establish post offices and post roads." The opinion did not discuss the question whether the registration provisions of the Securities Act of 1933 could also be sustained under the commerce clause.

In conformity with its opinion, the Circuit Court of Appeals entered a decree affirming the order of the District Court directing Jones to appear before the Commission and testify [2] (No. 640, R. 185–

[2] By agreement of counsel, execution of this order was stayed until final disposition of the cause by this Court.

186). This decree is the one sought to be reviewed by the petition for a writ of certiorari in No. 640.

ARGUMENT

It is submitted that the decision below is correct, that it is not in conflict with decisions of other Circuit Courts of Appeal, and that it is not in conflict, but in conformity, with applicable decisions of this Court.

However, the question of the power of Congress to enact the registration requirements of the Securities Act is novel and of obvious public importance. The same cannot be said of the other questions sought to be presented. The only question raised in No. 639, and the first two questions presented in No. 640 (numbered 2 and 3) relate to minor procedural matters, as to which lower courts have entertained no doubt.

Although we do not oppose the granting of a writ in either No. 639 or No. 640, we respectfully submit the following analysis of the four issues in the two cases, for the purpose of aiding the Court in determining whether one or both writs of certiorari should be granted, and whether, if they be granted, the writs should be limited to the fundamental question of the power of Congress to enact the registration provisions of the Securities Act of 1933.

1. In No. 639, the lower court was clearly correct in deciding that the Commission's interlocu-

tory rulings denying Jones's motions to withdraw his registration statement were not reviewable in the Circuit Court of Appeals under Section 9 (a) of the Securities Act of 1933, Act of May 27, 1933, ch. 38, 48 Stat. 80 (U. S. C., Title 15, Sec. 77 (i) (a)). The pertinent part of this section provides that "Any person *aggrieved* by an *order* of the Commission may obtain a review of such order."

An examination of the Securities Act clearly indicates that the word "order" as used in the above-quoted sentence means a final order and not a mere interlocutory ruling as to a preliminary procedural matter. The only orders which the Securities Act authorizes the Commission to enter are those relating to the effectiveness of registration statements. Section 8 (b), (d), and (e) of the Securities Act of 1933, Act of May 27, 1933, c. 38, 48 Stat. 79 (U. S. C., Title 15, Sec. 77 (h)). These orders may be entered only after notice and hearing, and obviously require final determinations of fact by the Commission. Only such orders—authorized by the sections immediately preceding Section 9 (a)—are reviewable under Section 9 (a).

The interpretation which we urge has been given to similar statutes providing for review of orders of the Interstate Commerce Commission, *United States* v. *Illinois Central Railroad Co.*, 244 U. S. 82, 89; *United States* v. *Los Angeles Railroad*, 273 U. S. 299, 309–310; and of orders of the Federal Trade Commission, *Chamber of Commerce of Min-*

neapolis v. *Federal Trade Commission*, 280 Fed. 45 (C. C. A. 8th); *Nulomoline Co.* v. *Federal Trade Commission*, 254 Fed. 988 (C. C. A. 2d). And this is consistent with the ordinary limitation of the appellate jurisdiction of the Circuit Courts of Appeal to final orders of the District Courts. Section 128 of the Judicial Code, (U. S. C., Title 28, Sec. 225); *McLish* v. *Roff*, 141 U. S. 661.

Any other interpretation would have disastrous practical consequences. It would leave the door open for a recalcitrant or dilatory party to present successive petitions to the Circuit Courts of Appeal to review every minor procedural ruling of the Commission, thus indefinitely prolonging the final determination of a proceeding, and defeating the ends which Congress had in view in setting up machinery for expeditious administrative determinations.

Moreover, even if interlocutory rulings in general were reviewable in the Circuit Court of Appeals, Jones has no status to appeal from this interlocutory ruling. He is not, in the words of the statute, a "person aggrieved", as he has suffered no pecuniary or other damage by the Commission's refusal to let him withdraw his registration statement. Until the Commission makes the registration statement ineffective by the issuance of a stop order, Jones cannot be aggrieved or suffer. Cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 174.

We therefore submit that the issue raised in No. 639 involves a purely procedural question of the right to review interlocutory rulings of the Commission, a question solely of the interpretation of Section 9 (a) of the Securities Act. The issue of the constitutionality of the Act is in no way involved in No. 639. In view of these factors, and of the manifest correctness of the decision below, and of the lack of conflict of such decision with applicable precedents, it is suggested that the writ might well be denied in No. 639, even though a writ be granted to review some of the questions presented in No. 640.

2. The ruling of the Commission refusing Jones's request to withdraw his registration statement (No. 639, R. 180–181) has been attacked by Jones on several different grounds, but none of them seems tenable, or the subject of conflict in the lower courts, or sufficiently important to justify review by this Court.

The right to withdraw a registration statement is not expressed or implied anywhere in the Act itself. A regulation of the Commission, published in Release No. 47, however, provides that consent to a withdrawal "shall be given by the Commission with due regard to the public interest and the protection of investors." Jones first contends that the regulation itself is invalid because it is an example of legislative action by an agency in the executive branch of the Government. But as a regulation "governing registration statements" it is

specifically authorized by Section 19 (a) of the Securities Act of 1933, Act of May 27, 1933, c. 38, 48 Stat. 85 (U. S. C., Title 15, Sec. 77 (s)). And Congress can delegate to the Commission this power to regulate the minutiae of procedure regarding registration statements. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *United States* v. *Janowitz*, 257 U. S. 42; *Avent* v. *United States*, 266 U. S. 127. Nor were any findings by the Commission a necessary prerequisite to promulgation of this regulation "because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern." *Pacific States Box & Basket Co.* v. *White*, Oct. Term, 1935, No. 48, p. 7.

It is next contended that the regulation deprives Jones of his liberty and property without due process of law. We know of no authority for the proposition that one who has filed a registration statement or similar application has an unconditional right to withdraw it, particularly *after it has become effective*, and after inquiry to determine its truthfulness has begun. The registration statement twenty days after it had been filed became a document on which rights and liabilities have been or may be based. Cf. Act of May 27, 1933, c. 38, Sections 5, 11, 12, 24; 48 Stat. 77, 82, 84, 87 (U. S. C., Title 15, Sec. 77 (e) (k) (l) (x)). Even if it were not such a document, and only the equivalent of a pleading in a proceeding

before the Commission, a rule that forbade its withdrawal without the consent of the Commission would be reasonable. *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630 (C. C. A. 2d); *In re J. R. Palmenberg Sons*, 76 F. (2d) 935 (C. C. A. 2d). Withdrawal without the Commission's consent might prevent the issuance of findings sufficiently detailed to warn the public precisely of the fraudulent nature of a security; and might subject the Commission to the administrative impediment ~~to~~ receiving many and varied applications from the same issuer with respect to the same security without ever being able finally to act upon such applications.

A further point urged is that the regulation has not been published as required by Section 19 (a) of the Act of May 27, 1933, c. 38, 48 Stat. 85 (U. S. C., Title 15, Sec. 77 (s) (a)). The section referred to merely provides that—

> the rules and regulations of the Commission shall be effective upon publication in the manner in which the Commission shall prescribe.

Both the Federal Trade Commission, which administered the Securities Act when the regulation in question was published, and the Securities and Exchange Commission, which has administered the Act since September 1, 1934, have prescribed that all the principal newspapers shall be given all regulations immediately upon promulgation, and that *any* person may have his name placed upon the mailing list to receive free of charge regulations

as they are issued or compiled in booklets. This practice has been consistently followed by both Commissions, as appears from the affidavits appended hereto, which were also submitted to the lower courts. Moreover, any defect in the original publication of this regulation has been remedied by Section 210 of Title II of the Securities Exchange Act of 1934, Act of June 6, 1934, c. 404, 48 Stat. 908 (U. S. C., Title 15, Sec. 78 (ii)), which specifically continued in effect all regulations issued by the Federal Trade Commission.

Furthermore, Jones would not benefit if he could prove that the regulation was invalid. He would then be thrown back on the statute itself. And the statute, as already pointed out, neither explicitly nor implicitly gives a person a right to withdraw a registration statement that he has filed.

Finally, Jones contends that, even though generally valid, the regulation was not validly applied against him. He points out that the Commission made no specific findings on which to base its refusal to allow him to withdraw his registration statement. The rule itself does not purport to require such findings for a denial of a request to withdraw a registration statement. Moreover, there is no general principle that a finding of fact is required for interlocutory procedural rulings, particularly those which, instead of embodying an affirmative command, merely take the negative form of denying a request, which was itself absolute and without statement of reasons.

3. Jones has also urged that even if the proceedings pending before the Commission have not been terminated by his effort to withdraw his registration statement, the Securities Act of 1933 did not authorize the Commission to apply to the District Court for an order directing him to testify (Petition, pp. 13–14). (See also No. 640, R. 168, Assignments of Error 7–10.)

This argument first assumes that the power of the Commission to require testimony in the proceedings was derived exclusively from Section 8 of the Act of May 27, 1933, c. 38, 48 Stat. 79 (U. S. C., Title 15, Sec. 77 (h)); and next assumes that this section provides only for voluntary testimony and for subpenas duces tecum, but not also for subpenas ad testificandum. It is submitted that neither assumption is sound.

If the Commission had been proceeding exclusively under Section 8, subpenas ad testificandum would be authorized. Section 8 (d) is implemented by Section 8 (e), which provides:

> The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine the issuer, underwriter, or any other person, in respect of any matter relevant to the exam-

> ination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

It is unreasonable to interpret this section as sanctioning the more burdensome subpenas duces tecum, but not the less onerous subpenas ad testificandum. Cf. *Brownson* v. *United States,* 32 F. (2d) 844 (C. C. A. 8th). And indeed from the later section of the Securities Act, which lays down the procedure to be followed in case of contumacy or refusal to obey subpenas, Act of May 27, 1933, c. 38, Sec. 22 (b), 48 Stat. 86 (U. S. C., Title 15, Sec. 77 (v) (b)), it is clear that "examiners" (that is, the persons who in stop order proceedings are by Section 8 (c) "empowered to make an examination") were regarded by Congress as having power to issue subpenas ad testificandum.

Even if, as a matter of precedent and specific statutory interpretation, the power to compel testimony were doubtful, it must be implied as a necessary adjunct to the quasi-judicial functions exercised by the Commission in stop order proceedings. The elaborate machinery set up in Section 9 for judicial review of the Commission's orders presupposes the power of the Commission to pre-

pare a complete record, including all available evidence and not limited to the testimony of voluntary witnesses. In particular, the fact that a circuit court of appeals may remand a case to the Commission to take additional testimony only if the court is shown that the parties had reason for not adducing such testimony at the original proceeding necessarily assumes that such testimony could have been compelled at the original proceeding.

Furthermore, the proceedings before the Commission seem to have been directed not only at a potential stop order under Section 8, but also at an investigation under Section 19 (b) (No. 640, R. 63, 71, 19–21). The investigation of a person alleged to have filed a false or misleading registration statement is clearly an appropriate method for enforcement of the Act, since it may disclose willful violations punishable under Section 24, 48 Stat. 87 (U. S. C., Title 15, Sec. 77 (x)). And Section 19 (b) expressly empowers the officers of the Commission to subpoena witnesses in aid of investigations.

4. The remaining question is whether the registration requirements of the Securities Act of 1933 are a valid exercise of the powers granted to Congress by the United States Constitution. This constitutional issue is not raised in No. 639. It is, however, to be presented in No. 640, if the power to subpena Jones to testify regarding his registration statement depends upon the validity of the registration requirements of the Securities Act. More-

over, the validity of the registration requirements is a novel question of federal law which if it is raised in No. 640 is of sufficient general importance to justify the granting, in that case, of a writ of certiorari limited solely to this constitutional issue. Although not opposing the petition for certiorari on this question, we submit the following brief statement for the purpose of clarifying the issue and illustrating the conformity of the decision below with applicable decisions of this Court.

Unless a registration statement is in effect as to a security, Section 5 of the Securities Act makes it unlawful to use the mails or instruments of interstate commerce to offer, sell, or deliver securities. This section does not impinge upon "the minutest details of the business and affairs of men who issue, purchase, and sell securities" (Petitioner's Brief, p. 15). On the contrary, its incidence is only upon the use of the mails and of instruments of interstate commerce. Since the Act is inapplicable in other circumstances, no question is here presented as to whether the statute encroaches upon the powers of the several states to regulate intrastate business.

Jones does not challenge the settled doctrine that Congress may, in exercise of the power "to establish post offices and post roads", provide for the regulation of the use of the mails, and for the punishment of such use in furtherance of a scheme which it deems contrary to public welfare. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143

U. S. 110; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Badders* v. *United States,* 240 U. S. 391; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407; *Leach* v. *Carlile,* 258 U. S. 138.

The decisions of this Court upholding state blue-sky laws establish that the particular type of regulation involved in the registration requirements does not violate due process of law, since it is reasonably necessary for and adapted to the prevention of fraud in the sale of securities. *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey, Stuart & Co.,* 242 U. S. 568; cf. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539.

The power of Congress over interstate commerce extends to regulation of traffic in securities. Securities are certificates of title that may be, and customarily are, traded in and possess values independent of equities between the transferor and the transferee. In the ordinary usage of business, they are articles of commerce, and they may properly be so treated by federal legislation. See *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152; cf. *The Lottery Case* (*Champion* v. *Ames*), 188 U. S. 321. The distinction is obvious between such articles and the insurance contracts which this Court has considered mere "indemnities" and "personal contracts." *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, and cases therein collected.

As articles of commerce, securities in interstate traffic are subject to the power of Congress to regu-

late interstate commerce to prevent injury to those in the State of destination. *Brooks* v. *United States,* 267 U. S. 452; and cases therein collected; *McDermott* v. *Wisconsin,* 228 U. S. 115. As already pointed out, the registration requirements of the Act do not transcend the limitations of due process. *Caldwell* v. *Sioux Falls Stock Yards Co., supra; Merrick* v. *Halsey, Stuart & Co., supra; Hall* v. *Geiger-Jones Co., supra.*

Respectfully submitted.

STANLEY REED,
Solicitor General.

JOHN J. BURNS,
General Counsel, Securities and Exchange Commission.

CHARLES E. WYZANSKI, JR.,
Special Assistant to the Attorney General.

FRANCIS CURRIE,
CHARLES R. KAUFMAN,
Attorneys.

JANUARY 1936.

APPENDIX

In the District Court of the United States for the Southern District of New York

No. M17–191

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

v.

J. EDWARD JONES, RESPONDENT

AFFIDAVIT OF OTIS B. JOHNSON ON BEHALF OF THE APPLICANT

UNITED STATES OF AMERICA,

District of Columbia, ss:

Otis B. Johnson, being duly sworn according to law, deposes and says:

1. That he is the Secretary of the Federal Trade Commission, having been appointed to that office on August 6, 1922;

2. That in such capacity he is in charge of all official records of the Federal Trade Commission, and had the duty of authenticating all regulations of said Commission under the Securities Act of 1933 from May 27, 1933, until September 4, 1934, and that he had the duty of publishing such regulations;

3. That the following regulation regarding withdrawal of registration statements was promulgated by the Federal Trade Commission on September 22,

1933, and was in full force and effect on September 4, 1934, when the administration of the Securities Act of 1933 was transferred from the Federal Trade Commission to the Securities and Exchange Commission, pursuant to Section 210 of Title II of the Securities Exchange Act of 1934:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

4. That the said regulation was available for public inspection in the public records of the Federal Trade Commission from the date of its promulgation on September 22, 1933, and that it was distributed free of charge to those newspapers and members of the public who were on the mailing list of the Federal Trade Commission or who requested copies of said regulation;

5. That on September 22, 1933, when the said regulation was promulgated and published, there were on the mailing list of the Federal Trade Commission approximately 450 newspaper correspondents which received all releases of the Federal Trade Commission, approximately 470 persons who received all releases of the Federal Trade Com-

mission, approximately 250 persons on a separate list to receive all releases of the Federal Trade Commission under the Securities Act of 1933, and approximately 100 persons on a separate list to receive all rules and regulations of the Federal Trade Commission under the Securities Act of 1933; that in addition to the foregoing list, copies of Release No. 47 containing the foregoing regulation were always kept available at the offices of the Federal Trade Commission for free public distribution.

(Sgd.) OTIS B. JOHNSON.

Subscribed and sworn to before me this 27th day of July 1935.

(Sgd.) EDNA B. VINCIL,
Notary Public, District of Columbia.

In the District Court of the United States for the Southern District of New York

No. M17-191

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

v.

J. EDWARD JONES, RESPONDENT

AFFIDAVIT OF FRANCIS P. BRASSOR ON BEHALF OF THE APPLICANT

UNITED STATES OF AMERICA,
District of Columbia, ss:

Francis P. Brassor, being duly sworn according to law, deposes and says:

1. That he is the Secretary of the Securities and Exchange Commission, having been appointed to that office on August 24th, 1934;

2. That in such capacity he is in charge of all official records of the Securities and Exchange Commission, and has the duty of authenticating all regulations of said Commission under the Securities Act of 1933, and has the duty of publishing such regulations;

3. That the following regulation regarding withdrawal of registration statements, promulgated by the Federal Trade Commission on September 22, 1933, was in full force and effect on September 4, 1934, when the administration of the Securities Act of 1933 was transferred from the Federal Trade Commission to the Securities and Exchange Commission:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with the date of the giving of such consent and in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commissin with due regard to the public interest and the protection of investors.

4. That by virtue of Section 210 of Title II of the Securities Exchange Act of 1934, the said regulation was continued in effect until modified, superseded, revoked, or repealed; and that the said regulation has not been modified, superseded, revoked, or repealed by the Securities and Exchange Commission;

5. That the said regulation is included in the compiled regulations of the Securities and Exchange Commission under the Securities Act of 1933, and is distributed free of charge to any person requesting copies of said compiled regulations; more specifically, that the said regulation was published on page 11 of the revised compilation of regulations issued by the Securities and Exchange Commission and its predecessor, the Federal Trade Commission, under the Securities Act of 1933, which revised compilation was published on April 29, 1935, and was and is available for free distribution to any member of the public requesting the same;

6. That approximately 2,700 copies of the aforesaid revised compilation of regulations under the Securities Act of 1933, dated April 29, 1935, have been distributed to members of the public; that copies of said compilation are always kept available for distribution free of charge to any member of the public requesting the same;

7. That no record is available as to the number of persons who have received, by their special request, copies of Release No. 47, which contains the aforesaid regulation concerning the withdrawal of registration statements, but that copies of said release are always available at the office of the Securities and Exchange Commission for free public distribution;

8. That the present mailing list of the Securities and Exchange Commission, to which copies of regulations under the Securities Act of 1933 are sent when promulgated, approximate: 150 newspapers and periodicals, 950 persons who receive the full text of all rules and opinions under the Securities

Act of 1933, 1,000 persons who receive all releases of the Securities and Exchange Commission, and 1,700 persons who receive an abstract of the regulations under the Securities Act of 1933; that any member of the public requesting it may be placed on any of these lists free of charge.

(Sgd.) FRANCIS P. BRASSOR.

Subscribed and sworn to before me this 27th day of July 1935.

[SEAL] (Sgd.) MARGUERITE M. ALLISON,
Notary Public, District of Columbia.

My commission expires March 1, 1940.

[For Immediate Release, Friday, September 22, 1933]

FEDERAL TRADE COMMISSION

WASHINGTON

Securities Act of 1933 Release No. 47

The Federal Trade Commission announces adoption of a rule under the Securities Act * * * text of the new rules is as follows: * * *

WITHDRAWAL OF REGISTRATION STATEMENT OR AMENDMENT THERETO

Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and

in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

U. S. GOVERNMENT PRINTING OFFICE: 1936

SECURITIES ACT OF 1933

[PUBLIC—No. 22—73D CONGRESS]

[H.R. 5480]

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[1]

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer

[1] The matter appearing in bold-face type with footnote references represents subsections and subparagraphs as amended. This and subsequent footnotes contain the text prior to amendment. Bold-faced type without footnote references indicates provisions added by amendment. The amendments, effective July 1, 1934, are contained in Title II of Securities Exchange Act of 1934, approved June 6, 1934.

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing."

to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.[a]

(5) The term "Commission" means the Federal Trade Commission.[b]

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto

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[a] "(4) The term 'issuer' means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term 'issuer' means the person by whom the equipment or property is or is to be used."

[b] See Secs. 27 and 28, infra, being Sections 210 and 212, Title II of Securities Exchange Act of 1934, providing for transfer to "Securities and Exchange Commission" of all powers, duties, and functions of the Federal Trade Commission.

among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of Section 10 was sent or given to the person to whom the communication was made, by the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.[5]

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to

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[5] "(10) The term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed."

any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing, or any security issued or guaranteed by any national bank, or by any banking institution organized under the laws of any State or Territory or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or Territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve Bank;[4]

(3) Any note, draft, bill of exchange, or bankers' acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person[5] organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common carrier which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the

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[4] "(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;"

[5] "Corporation."

Amendment to Section 3(a)(6) of the Securities Act of 1933, as amended.

The "Motor Carrier Act of 1935" (approved August 9, 1935), Section 214, amended Section 3(a)(6) of the Securities Act of 1933 to read as follows:

"(6) Any security issued by a common *or contract* carrier, *the issuance of* which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;"

The new law added is in italics.

supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;[6]

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;[6]

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.[7]

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the

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[6] The first clause of the following former Sec. 4 (3) has been replaced by Sec. 3 (a) (9) and the second clause by Sec. 3 (a) (10): "(3) The issuance of a security of a person exchanged by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors."

[7] The following former Sec. 5 (c) has been supplanted by Sec. 3 (a) (11): "(c) The provisions of this section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory."

whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.[8]

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by

[8] "(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement.

Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

SEC. 8 (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and

240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) When a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense.*

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by

* "(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use."

rules and regulations require the filing with it of forms and prospectuses used in connection with the sale of securities registered under this title.

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him.

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or cease or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and **(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.**[10]

[10] "(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.[11]

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit,

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effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document."

[11] "(c) In determining for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable gound for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship."

such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.[12]

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than three years after the security was bona fide offered to the public, or under section 12 (2) more than three years after the sale.[13]

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[12] "(e) The suit authorized under subsection (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security."

[13] "SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than ten years after the security was bona fide offered to the public."

CONTRARY STIPULATIONS VOID

SEC. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

ADDITIONAL REMEDIES

SEC. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. **No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.**

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

SEC. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judg-

ments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

SEC. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned no more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 27. Upon the expiration of sixty days after the date upon which a majority of the members of the securities and exchange commission appointed under Section 4 of Title I of this act have qualified and taken office, all powers, duties and functions of the Federal Trade Commission under the Secutities Act of 1933 shall be transferred to such commission, together with all property, books, records and unexpended balances of appropriations used by or available to the Federal Trade Commission for carrying out its functions under the Securities Act of 1933. All proceedings, hearings or investigations commenced or pending before the Federal Trade Commssion arising under the Securities Act of 1933 shall be continued by the Securities and Exchange Commission. All orders, rules and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed. All rights and interests accruing or to accrue under the Securities Act of 1933, or any provision of any regulation relating to, or out of action taken by, the Federal Trade Commission under such act, shall be followed in all respects and may be exercised and enforced.

Sec. 28. The commission is authorized and directed to make a study and investigation of the work, activities, personnel and functions of protective and reorganization committees in connection with the reorganization, readjustment, rehabilitation, liquidation, or consolidation of persons and properties and to report the result of its studies and investigations and its recommendations to the Congress on or before January 3, 1936.[14]

SCHEDULE A

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, associa-

[14] Secs. 27 and 28 are Secs. 210 and 211, Title II, of Securities Exchange Act of 1934, approved June 6, 1934, effective July 1, 1934.

tion, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the names of the principal underwriters of such security;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course

of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase

of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or if identic agreements are used the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing by-laws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

TITLE II

SECTION 201. For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

SEC. 202. The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two-thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

SEC. 203. The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provi-

sions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

SEC. 204. The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care of representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and

preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and to do all such other things as are incident or conducive to the attainment of the above objects.

SEC. 205. The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

SEC. 206. The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided*, That the board of directors in its discretion may distribute copies gratuitously.

SEC. 207. The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided*, That any charge levied at the time of depositing securities with the Corporation shall not exceed one fifth of 1 per centum of the face value of such securities: *Provided further*, That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Government, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to

obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved May 27th 1933.

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No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1935

J. EDWARD JONES, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 640

J. EDWARD JONES, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the District Court (R. 103–110) is reported in 12 F. Supp. 210, and the opinion of the Circuit Court of Appeals (R. 119–125) is reported in 79 F. (2d) 617.

JURISDICTION

The decree to be reviewed was entered November 12, 1935 (R. 125–126). A petition for rehearing was filed November 18, 1935, and denied on November 21, 1935 (R. 126–127). Petition for certi-

orari was filed December 17, 1935, and was granted February 3, 1936. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Securities Act of 1933 authorized respondent, the Securities and Exchange Commission, to seek, and the District Court to issue, an order requiring petitioner to appear and testify concerning a registration statement which he had theretofore filed pursuant to the Act.

2. Whether the provisions of the Securities Act which required the petitioner to appear and testify are a valid exercise of the powers granted to Congress by the Constitution.

STATUTES AND REGULATIONS INVOLVED

The Securities Act of 1933 (Act of May 27, 1933, c. 38, 48 Stat. 74, U. S. C., Title 15, Section 77a *et seq.*), as amended by the Act of June 6, 1934 (c. 404, 48 Stat. 881, 905), and the pertinent regulation of the Securities and Exchange Commission, are reprinted in the Appendix.[1]

STATEMENT[2]

On May 4, 1935, J. Edward Jones, the petitioner, filed a registration statement with the Securities

[1] The act reprinted in petitioner's brief as Appendix B is the Securities Act as originally enacted, without the amendments of 1934.

[2] A complete chronology of the present case has been added to the Appendix to the present brief, pp. 123–126, *infra*.

and Exchange Commission on the Commission's Form C–1, pursuant to Section 6 of the Securities Act, *infra,* p. 74. The registration statement, which is reprinted in full in the record (R. 33–88), covered an issue of "Participation Trust Certificates in producing oil royalties", known as "J. Edward Jones Royalty Trust, Series 'M.' "

It appeared to the Commission that this registration statement included untrue statements of material facts required to be stated therein, and omitted to state material facts necessary to make the statements therein not misleading (R. 3–4).[3] On May 20, 1935, the Commission, therefore, pursuant to the provisions of Section 8 (d) of the Act, *infra,* p. 78, directed that stop order proceedings be instituted before a designated officer of the Commission, to determine whether a stop order should be issued (R. 12). Notice was sent to petitioner by telegram on May 23, and confirmed by letter on May 24, that a hearing would be held on June 6, at which time petitioner might appear and show cause why the Commission should not issue a stop order suspending the effectiveness of the registration statement (R. 12–13; 89–90). By agreement

[3] The relevant facts are not in dispute. However, certain of the minutes, orders, etc., to which reference is made in the present case are not set out in full in the present record. They may be found in the record in *J. Edward Jones* v. *Securities and Exchange Commission*, No. 639, Oct. Term, 1935, in which petition for a writ of certiorari was denied. The Commission minute of May 20, 1935, authorizing the stop order proceeding, is set out in that record at p. 109, and is also reprinted in petitioner's brief at p. 68.

of counsel, the hearing was postponed to June 18, 1935. On May 24, twenty days after the date of filing, petitioner's registration statement became effective, pursuant to Section 8 (a) of the Act, *infra,* p. 77.

On June 18, the hearing and examination were duly held (R. 14). At the hearing counsel for petitioner attempted to withdraw the registration statement (R. 25). Permission to withdraw was refused by an appropriate ruling of the Commission (R. 25; see also R. No. 639, p. 180). The hearing was then adjourned to June 27 (R. 14).

On June 18 the officer conducting the hearing, pursuant to power granted him by an order of the Commission (R. 14), issued a subpoena directing petitioner to appear before said officer on June 27 to testify regarding his registration statement. (R. 15–16; 96.) This subpoena was duly served on petitioner by a United States Marshal in New York City on June 20, 1935, and service was admitted (R. 22). On June 27, petitioner failed to appear at the adjourned hearing but, through his counsel, appeared specially and stated that petitioner refused to obey the subpoena.

At the same hearing, counsel for petitioner presented successively a dismissal of the registration statement (R. 96–97), a motion to dismiss the registration statement (R. 97–98), a motion to quash the subpoena which had been served on petitioner (R. 98–99), and an objection to jurisdiction (R. 100–101). All the motions were denied (R. 26–27).

In making the several rulings on June 27, and in refusing petitioner permission to withdraw his registration statement on June 18, the Commission and the officer conducting the hearing acted under authority of a regulation of the Commission which was published in Release No. 47 on September 22, 1933, *infra*, p. 110. The pertinent part of the regulation provided (R. 92–93):

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. * * * The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent * * *. Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

On July 2 the Commission filed an application in the District Court of the United States for the Southern District of New York (R. 2–16), pursuant to Section 22 (b) of the Act, *infra*, p. 96. This application sought an order of the District Court directing petitioner to appear before the Commission, or one of its examiners, "to testify in the matter of the registration statement of J. Edward Jones and to give answer to any and all pertinent questions regarding the information and documents heretofore filed by the respondent [Jones]

with the Commission upon the said registration statement" (R. 15). An order to show cause issued (R. 16) and petitioner appeared and filed an answer (R. 17–29).

After argument, the District Court, on August 12, 1935, rendered an opinion (R. 103–110) holding that the Commission was authorized, under the Act and the regulation published in Release No. 47, to deny petitioner's motions to dismiss his registration statement, and to continue the proceedings in which petitioner had been subpoenaed to testify; and further holding that the provisions of the Securities Act were a valid exercise of the powers of Congress over "commerce with foreign nations and among the several states" and over "post offices and post roads." Accordingly, on August 23, 1935, the District Court issued an order granting the prayer of the Commission's application. (R. 102–103.) The order was affirmed by the Circuit Court of Appeals (R. 126). That court rested the validity of the Securities Act solely on the power of Congress "to establish post offices and post roads" (R. 119–125), and found it unnecessary to discuss the question whether the registration provisions of the Act could also be sustained under the commerce clause.

SUMMARY OF ARGUMENT

I

The Commission submits that the registration statement filed by the petitioner became effective

by operation of law despite petitioner's attempts to withdraw it. The Commission properly refused to permit withdrawal pursuant to a valid regulation which is authorized both by Section 19 (a) of the Act and by the inherent power of the Commission, as a quasi-judicial tribunal, to limit the right of petitioner to terminate the proceedings before the Commission. This regulation is reasonable, since it is conditioned on a standard of public interest and the protection of investors, and it is necessary because an unqualified privilege of withdrawal would seriously embarrass the work of the Commission and deprive it of the most effective means of enforcing the registration provisions of the Act.

The publication of this regulation satisfied the requirements of Section 19 (a) of the Act and was clearly adequate to give reasonable notice of its promulgation. Petitioner does not claim he was ignorant of the regulation. The Act does not improperly delegate legislative power to the Commission, for the power to regulate the minutiae of its own procedure may certainly be delegated to a quasi-judicial tribunal.

The regulation was properly applied in the instant case, for the Commission was not required to find that its refusal to permit withdrawal of the statement was in the public interest and for the protection of investors. Such a finding is a preliminary determination of fact resting in the discretion of the Commission; no principle of law

requires a finding by a court or an administrative tribunal prior to the application of an interlocutory procedural regulation.

It follows that petitioner's registration statement is still effective, and the stop order hearing thereon, in which the petitioner was subpoenaed to testify, is still pending before the Commission. Sections 8 (d) and 8 (e) of the Act expressly authorize subpoenas *duces tecum* in such a hearing, so that the less onerous subpoenas *ad testificandum* must also be authorized. This follows, too, from the finality attributed to the findings of the Commission on review by a Circuit Court of Appeals (Section 9). Even though the Commission may issue a stop order if the issuer refuses to testify, this is not the only remedy available, for such a construction would work an injustice in some cases. In any event, Section 8 is implemented by Section 19 (b), expressly authorizing subpoenas in all investigations necessary for the enforcement of the Act.

Petitioner's claim that the Commission is engaged on a "fishing expedition" is rebutted by the notice of the stop-order hearing, specifying in detail the items in the registration statement on which information is desired, and by the order of the District Court, requiring petitioner to testify only as to pertinent matters.

II

For purposes of determining the validity of the present order the only section which is material is Section 5 (a). Since petitioner did not wait for specific questions to be put to him but flatly refused to appear before the Commission, he must demonstrate that there is no question which the Commission validly might ask concerning his registration statement. Similarly, to sustain the validity of the present order the Commission need only show that there is some purpose for which the Commission can validly require that petitioner appear before the Commission for questioning upon matters contained in his registration statement.

A

The postal power of Congress is a plenary one and under it Congress has wide discretion as to the matter which shall be carried and that which shall be excluded from the mails. This power is not limited to excluding only that matter which might be injurious to the postal service or the personnel, for in numerous cases this Court has sustained statutes excluding from the mails matter deemed injurious to the public, such as lottery tickets, obscene matter, and communications in furtherance of a scheme to defraud. The requirements of Section 5 in issue in the present case are another instance of the exercise of the established power of Congress to close

the mails to matter which it deemed contrary to the public welfare, and are thus amply sustained by these cases.

Congress may exclude securities which themselves contain misstatements. Congress may also exclude such securities if they are an integral part of a scheme to defraud. Further, Congress may require registration of all securities since this is reasonably necessary to make effective the exercise of its regulatory power. Finally, that the act will not bar from the mails all harmful securities is no objection to its validity; Congress may certainly limit the exercise of its power to the particular type of evil here involved, namely, the failure to disclose the true character of securities.

Petitioner contends that Section 5 (a) of the Act conflicts with the Tenth Amendment. This Court has, however, several times pointed out that Congress need not have power to deal with crime or immorality within the States in order to forbid the use of the mails in furthering such activities. Nor does the Act, as petitioner contends, apply to persons rather than to objects mailed, although even if it be so construed, its constitutionality is clearly sustained by previous decisions of this Court. Petitioner's final contention that a requirement of registration violates the due process clause of the Fifth Amendment is unsound, for such a requirement in state securities acts has frequently been

sustained by this Court, and a substantially similar requirement was upheld in connection with the power of Congress to classify mailable matter.

B

In support of its contention that the registration provisions of the Securities Act are a valid exercise of the commerce power of Congress, respondent submits that (1) securities are subjects of commerce, and (2) a prohibition against the interstate transportation of unregistered securities is within the regulatory power of Congress.

Securities are "subjects of commerce" not only because they are so treated by ordinary business usage and state legislation, but also because they comply with the applicable legal standards formulated in the *Lottery Case,* 188 U. S. 321, and the insurance cases. If they are transported across state lines without being truthfully described they may injure persons in the state of destination. The prevention of the spread of evil across state lines and the prohibition against the use of the facilities of interstate commerce as an agency to promote dishonesty are shown by prior decisions to be within the scope of Congressional regulatory power. Since in the Securities Act the regulatory power has been used merely to require a disclosure of the character of subjects carried and not to affect their local production the Act does not fall within the prohibition of the Tenth Amendment

nor of *Hammer* v. *Dagenhart,* 247 U. S. 251. The particular form of securities regulation involved in registration has already been held to afford due process in the substantially similar field of State Blue Sky legislation.

ARGUMENT

I

THE SECURITIES ACT OF 1933 AUTHORIZED THE COMMISSION TO SEEK, AND THE DISTRICT COURT TO ISSUE, THE ORDER REQUIRING PETITIONER TO APPEAR AND TESTIFY CONCERNING HIS REGISTRATION STATEMENT

Petitioner urges (Br., pp. 57–71) that the Securities Act, properly interpreted, does not authorize the issuance of the present order requiring him to appear and testify before the Commission. The argument is made that no proceeding is pending before the Commission in which a subpoena could issue, since petitioner's attempts to withdraw his registration statement terminated its effectiveness. In support of this, petitioner argues that his attempts to withdraw it were denied pursuant to a regulation which is not only invalid, but also improperly applied to him. Petitioner also argues that even though permission to withdraw his statement was properly denied, nevertheless the Act gives the Commission no power to compel him to appear and testify in the hearing which it was conducting. Respondent submits that neither argument is sound.

The first issue raised by the petitioner, then, is whether his registration statement is still effective.[4] which, in turn, depends upon whether the Commission has authority to impose restrictions on petitioner's right to withdraw it. The restrictions which the Commission imposes have been set forth in the regulation of September 22, 1933, published in Release No. 47 of the Federal Trade Commission, *infra*, p. 110, and continued in effect as a regulation of the Securities and Exchange Commission.[5]

---

[4] Petitioner is manifestly in error in his contention (Br. p. 2) that his registration statement never became effective at all because of the telegraphic notice of the stop order hearing dated May 23, 1935 (R. 12–13). This notice merely stated that it appeared to the Commission that his registration statement contained untrue statements and omissions of material facts and also stated that petitioner might appear and show cause on June 6, 1935, why a stop order should not issue suspending the effectiveness of his registration statement. Once a statement has been filed it becomes effective in 20 days pursuant to Section 8 (a), except for two contingencies: (1) an amendment may be filed pursuant to Section 8 (a); (2) a notice may be given within ten days after filing pursuant to Section 8 (b) that the registration statement is incomplete or inaccurate, followed by an order of the Commission postponing the effective date. Neither of these was done. Petitioner's registration statement, therefore, having been filed on May 4, 1935, became effective on May 24, 1935, by force of Section 8 (a).

[5] Section 210 of the Securities Exchange Act of 1934 (c. 404, 48 Stat. 908, U. S. C., Title 15, Sec. 78ii) provided: "* * * All orders, rules, and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed."

The pertinent provision of this regulation provided:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following manner: "Withdrawn upon the request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

Respondent submits that the Act clearly invests it with power to promulgate such a regulation, and that even without such statutory authority the regulation would be justified under the inherent powers of a quasi-judicial tribunal.

The statutory authority for the regulation in question is found in Section 19 (a) of the Act, *infra,* p. 92, which provides:

> The Commision shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements * * *.

The power "to make * * * rules * * * governing registration statements" seems clearly to include the power to regulate the mechanics of filing and withdrawing such statements. The word "governing" which is used in this provision is a word which in its normal usage must be taken to confer broad powers. Moreover, power to prescribe by rules and regulations the form and, within limits, the content of registration statements has been specifically granted to the Commission by the provisions of Section 7 and Schedule A, so that in order to ascribe any meaning at all to the discretion given the Commission under the above language of Section 19 (a), that body must thereby at least be empowered to regulate the procedural mechanics incident to the filing and withdrawal of registration statements.

Yet even without the specific power granted to the Commission in Section 19 (a), the inherent power of any judicial or quasi-judicial tribunal to control its proceedings would invest the Commission with the power to enact this regulation concerning withdrawal. In effect, the regulation merely imposes a reasonable condition upon the right of the registrant to terminate the orderly procedure which he has set in motion by the filing of his registration statement. Analogous rules regulating the voluntary dismissal of bills of complaint have long been familiar in courts of equity. In the federal practice, the complainant must move for

an order of dismissal and let the court fix the terms. *American Zylonite Co.* v. *Celluloid Manuf'g. Co.*, 32 Fed. 809 (C. C. S. D. N. Y.). And a local equity rule which allows the court to refuse a plaintiff permission to discontinue his action where justice so requires, even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice is a possible second suit, has been adjudged valid. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, No. 232, Oct. Term, 1935, decided Feb. 10, 1936; *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630 (C. C. A. 2). Irrespective of the rule which may be applicable if no regulation of the complainant's right to withdraw exists (see *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86), a regulation limiting that right is procedural and within the power of a quasi-judicial tribunal such as the respondent. Cf. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co., supra.*

The cases cited by petitioner (Br., pp. 59–60) are not to the contrary. In *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (C. C. A. 5) and *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, the action was at law and in each case the point in issue was whether Federal courts should conform to state statutes expressly permitting voluntary nonsuits. In *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, and *Thomson-Houston Electric Co.* v. *Holland*, 160 Fed. 768 (C. C. N. D. Ohio), no rule restricting the right to withdraw was involved, and the plaintiff was

allowed to withdraw. Such decisions are not inconsistent with a valid limitation imposed by rule of a court or any other quasi-judicial tribunal.[6] Cf. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co., supra.*

Undoubtedly, the limitation imposed upon the registrant's right to withdraw must be reasonable, and not arbitrary or capricious. But the standard applied in this regulation—"with due regard for the public interest and the protection of investors"—is consonant with the spirit and purpose of the whole Act, and some limitation on the right of a registrant to withdraw is necessary for the effective administration of the Act. It is obvious that a registration statement ceases to be effective upon withdrawal, and can thus be no longer the subject of a stop order hearing which can only result in an order suspending the effectiveness of the statement.

To allow a registrant an unqualified privilege of withdrawal, with the consequent ability to terminate any stop order hearing or to prevent such a

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[6] The doctrine of *Ex parte Skinner & Eddy Corp., supra,* that in the absence of a controlling rule a court has no interest in retaining a suit which a litigant desires to dismiss, should not be extended to an administrative tribunal. Such a tribunal, in addition to ~~judicial~~ functions, has the executive responsibility of detection and enforcement. When a *specific* matter is drawn to its attention, it therefore has an interest in completing an analysis of that subject. A court has no similar interest for its function is confined to deciding such controversies as parties demand to have heard.

hearing, would seriously embarrass the work of the Commission. Such a broad privilege would permit the registrant to avoid, in large part, the registration requirements of the Act, by filing a registration statement with such limited information as he chose to give, withdrawing it when its deficiencies were detected, and repeating the process *ad infinitum* in the hope that by perseverance he might escape the vigilance of the examiner. Properly to perform its function of examining the matters set out in registration statements, the Commission must have the power, in cases where it believes it to be in the public interest, to refuse to permit the withdrawal of a registration statement, and to insist upon a final determination of the correctness of the statement filed. Only in this way can the Commission intelligently and expeditiously examine registration statements.

Of even greater significance is the fact that stop order hearings in regard to particular registration statements, and the final orders and opinions based thereon, constitute the most effective of the methods by which the Commission is to insure the accuracy and completeness of registration statements in general. The Commission may, it is true, investigate pursuant to Section 19 (b), and if it finds that the matters set out in the registration statement are false or incomplete, it may enjoin the continuance of this violation, or recommend criminal prosecution if the violation be willful. These, however, are extraordinary remedies requiring resort to the

courts; they are not to be lightly undertaken and are to be used only in exceptional cases. For the day-to-day administration of the registration provisions of the Act, the Commission must depend on the administrative remedy of the stop order, and if this is to be an effective sanction, hearings looking toward the issuance of stop orders must not be terminable at the pleasure of a registrant who desires to withdraw his statement.

Petitioner, however, advances several arguments to show that the regulation limiting withdrawals is invalid, even if it be specifically authorized by the Act or impliedly authorized by the necessities of procedure before the Commission. First, it is urged that the regulation is invalid because it has not been published in the manner required by the Act. The argument is based on a provision of Section 19 (a) which states:

> The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.

Petitioner, pointing out that there is no rule or regulation of the Commission prescribing the manner of publication of its rules and regulations, urges that the absence of such a rule invalidates every rule of the Commission, particularly since violation of some regulations may subject one to criminal penalties.

It seems obvious that the language quoted, upon which petitioner relies, does not bear out his

contention. The section does not require the Commission to prescribe "by rules and regulations" the manner in which its rules and regulations are to be published. Where Commission action is conditioned on the use of rules and regulations, the Act expressly so states. See, *e.g.*, Sections 3 (b), 6 (d), 7, 10 (b) (2), 10 (b) (3), 10 (b) (4), 10 (c) and Schedule A. Consequently, although adequate notice of the promulgation of regulations must be given to the public, the manner in which the Commission prescribes such notice need not be established by regulation.

Petitioner does not urge that the manner of publication actually utilized by the Commission is inadequate, nor has he at any time denied that he knew of the regulation limiting withdrawals. However, in order that the lower courts might be informed of the procedure which had been adopted, there were annexed to the briefs in both courts below affidavits by the Secretaries of the Federal Trade Commission and of the Securities and Exchange Commission, respectively, which have also been reprinted in the Appendix to the present brief at pp. 117–122. As appears from these affidavits, both the Federal Trade Commission, which was administering the Securities Act when the regulation in question was published, and the Securities and Exchange Commission, which has administered the Act since September 1, 1934, have made provision for wide publicity of their regulations

immediately upon promulgation. Thus, every regulation is given immediately to all the principal newspapers, and *any* person may have his name placed on the mailing list to receive free of charge all regulations as they are issued or compiled in booklets.[7] Such publication seems clearly adequate. Particularly should this be so with regard to a regulation such as the present one, which is merely procedural, and cannot possibly be made the basis of any penalty. Moreover, any defect in the original publication of this regulation has been remedied by Section 210 of Title II of the Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 908, U. S. C., Title 15, Sec. 78ii, reprinted in part in footnote 5, p. 13, *supra*), which specifically continued in effect all regulations issued by the Federal Trade Commission. Cf. *National Lead Co.* v. *United States,* 252 U. S. 140; *Brewster* v. *Gage,* 280 U. S. 327. Although this congressional action may not have cured irregularities in individual regulations, it must have cured any general defect involving all regulations alike.

Petitioner also suggests (Br., p. 60) that if the Act does authorize the regulation regarding with-

[7] The Federal Register Act (Act of July 26, 1935, 49 Stat. 500) and the regulations prescribed by the Administrative Committee of the Federal Register, approved by the President March 2, 1936, provide that on and after March 12, 1936, all rules and regulations pursuant to the authority of the Securities Act of 1933 shall be published in the Federal Register. Such publication will be in addition to publication in the manner now prescribed by the Commission.

drawal, it improperly delegates legislative power to the executive branch of the Government. But Congress can certainly delegate to an administrative officer or a commission the power to regulate the minutiae of the procedure of registration. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214–215; *United States* v. *Grimaud*, 220 U. S. 506, 517. The recent cases upon which petitioner relies expressly recognize that details of a subordinate nature may be supplied by administrative regulations. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428–429; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530. Moreover, petitioner's argument does not meet the point that the regulation in question may be justified under the inherent power of a quasi-judicial tribunal to control the proceedings before it, by rule or otherwise (*supra*, pp. 15–17). Cf. *Wayman* v. *Southard*, 10 Wheat. 1. Petitioner's further suggestion (Br., p. 63) that findings were a necessary prerequisite to the promulgation of the regulation is without foundation, for the regulation was general in scope, "not an administrative order in the nature of a judgment directed against an individual concern." *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186.

Finally, petitioner contends that, even though generally valid, the regulation of the Commission was not validly applied against him, because the Commission made no appropriate finding that the refusal of its consent to the withdrawal of petition-

er's registration statement was in the public interest and for the protection of investors. The decision of the Commission to refuse consent was, however, merely a preliminary determination of fact which, in the absence of a showing that the exercise of discretion was arbitrary, rests in the discretion of the Commission. *Hills Bros.* v. *Federal Trade Commission,* 9 F. (2d) 481, 483 (C. C. A. 9); *Moir* v. *Federal Trade Commission,* 12 F. (2d) 22, 28 (C. C. A. 1). Cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 29. The rule itself does not require findings for a denial of a request to withdraw, and there is no general principle that a finding must be made by either a court or an administrative tribunal prior to the application of such interlocutory procedural rules. Particularly should this be so when the ruling does not embody an affirmative command, but merely denies a request.

Petitioner's second major contention (Br., pp. 64–69) is that even if proceedings pending before the Commission have not been terminated by his efforts to withdraw his registration statement, the Securities Act did not authorize the order requiring him to appear and testify. This argument first assumes that the power of the Commission under Section 8 is limited to taking voluntary testimony and to issuing subpoenas *duces tecum,* but does not extend to subpoenas *ad testificandum;* and second, assumes that the sole source of power to require testimony in the instant proceeding is contained in

Section 8. Respondent submits that neither contention is sound.

Section 8 (d) of the Act, which authorizes the institution of stop-order proceedings, provides:

> If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material facts required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. * * *

This section is supplemented by Section 8 (e), which provides:

> The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet * * *.

> If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

There can be no doubt that Section 8 (e) authorizes the Commission to issue subpoenas *duces tecum*, and it should require much more specific language to justify the conclusion that Congress intended to allow the burdensome subpoena *duces tecum*, but not the less onerous subpoena *ad testificandum*.

That this construction of Section 8 (e) is proper is further borne out by the administrative importance of the "hearing" provided for in Section 8. The stop order, issued on the basis of such a hearing, is a final order of the Commission which is reviewable in the Circuit Court of Appeals pursuant to Section 9 (a), *infra*, pp. 79–81. The latter section also makes express provision for the finality of the findings of the Commission as to the facts upon which the order was based—facts which can be adduced only at the hearing. In order that the Commission might properly conduct a proceeding which will result in a final determination affecting the rights of the parties to the proceeding, Congress must have intended to confer upon it complete power to compel the production of any evidence nececessary to the final determination. Moreover, where a Circuit Court of Appeals, on application of either party, grants leave to adduce additional evi-

dence, Section 9 provides that such evidence shall be taken before the Commission, also at a "hearing". No provision is made for reference to a master or other officer of the court who would have power to issue subpoenas. Such power must inhere in the grant of authority of the Commission to hold a "hearing" before a stop order issues.

Petitioner also argues (Br., p. 66) in support of his contention, that the last sentence of Section 8 (e) means that the issuance of a stop order is the sole remedy available to the Commission if the issuer refuses to testify in a stop order proceeding. The sentence is as follows:

> If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

The argument fails to give due weight to the wording of the sentence. The power of the Commission is permissive—the conduct specified "shall be proper ground" for the issuance of a stop order, but its issuance is not mandatory, nor reasonably indicated to be the sole recourse of the Commission. If the Commission believes that an examination will enable it more adequately and properly to carry out its functions, it may subpoena witnesses and require the production of documents; if the purposes of the Commission will be adequately served merely by a stop order, the failure to cooperate in the hearing allows the Commission

to enter one forthwith. In the absence of specific authority to issue an order upon such a basis, it might well have been considered to be issuable only upon objective evidence as opposed to mere obstructive tactics.

Any other interpretation of this provision might, in many cases, work a hardship. The provision is equally applicable to issuers and underwriters; refusal of an underwriter to cooperate is ground for the issuance of a stop order. Consequently, if the provision were mandatory or the only method by which the Commission could punish contumacy, the refusal of an underwriter to testify might result in the suspension of the effectiveness of a registration statement even though the issuer were willing in good faith to cooperate with the Commission's examination in every respect. It is very unlikely that Congress could have intended any such result.

Moreover, petitioner's argument as to the proper construction and effect of the language of Section 8 ignores Section 19 (b) as a further source of the Commission's power to subpoena witnesses in a stop order proceeding. By that section the Commission or any officer designated by it is expressly authorized to subpoena witnesses and take evidence "for the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title." It seems clear that a hearing under Section 8 (d) is such an in-

vestigation. The court below so decided (R. 124) and respondent submits that its determination was clearly sound. Certainly, if any examination be "necessary and proper for the enforcement of this title", a hearing to determine whether a stop order should issue should fall into the category.[8] See pp. 18–19, *supra*.

Petitioner's final objection to the present order (Br., pp. 69–71) is that it allows the Commission to embark upon a "fishing expedition." There are several answers to the contention. First, the notice of the stop order hearing (R. 12–13) and paragraph V of the application for the present order

[8] Although respondent believes that the authority of the District Court to issue the present order is amply sustained by the power given the Commission under Section 8 (d) and 8 (e) to determine whether a stop order should issue suspending the effectiveness of a registration statement, there is an additional basis upon which the order may be upheld. Several facts indicate that the proceeding before the Commission was directed, not only at a potential stop order under Section 8 (d), but also at an independent investigation under Section 19 (b). The application for the present order stated (R. 14) that the subpoena had been issued pursuant to both Section 8 (e) and Section 19 (b); the order of designation authorizing the officer of the Commission to conduct the proceedings (R. 14) was couched in the language of Section 19 (b) with regard to the powers conferred upon the designated officer; and the allegations in paragraph V of the application for the order (R. 3–12) show quite clearly that the Commission had reason to believe that the appellant was not only violating the registration requirements of the Act, but also that the violations are willful. And Section 19 (b) expressly empowers the officers of the Commission to subpoena witnesses in aid of investigations.

(R. 3–12) each specifies in detail the fifteen items in the registration statement upon which the Commission desires to examine the petitioner. Second, the order issued by the District Court (R. 102–103) requires petitioner to appear and testify only with regard to "any and all *pertinent* questions regarding the information and documents heretofore filed by the respondent with the Commission upon the said registration statement" (italics supplied). Finally, if at the hearing, any questions are asked which are not pertinent to the issues involved, it will be time enough then to object to them as beyond both the authority of the Commission and the order of the District Court.

II

THOSE PROVISIONS OF THE SECURITIES ACT OF 1933 WHICH REQUIRE THE PETITIONER TO APPEAR AND TESTIFY REGARDING HIS REGISTRATION STATEMENT, ARE A VALID EXERCISE OF THE POWERS GRANTED TO CONGRESS BY THE CONSTITUTION.

It has long been common knowledge that the facilities of the postal service and of the instrumentalities of interstate commerce have been used to practice misrepresentation, frauds, and a concealment of material facts in the sale of securities to the American people.[9] The losses thus incurred, al-

[9] See, e. g., *Annual Report of the Postmaster General* (1934), p. 56; *Report of the Senate Committee on Banking and Currency* (Sen. Rep. No. 1455, 73d Cong., 2d Sess.), Ch. II, esp. pp. 93, 100–101.

though impossible even to estimate accurately, are known to be enormous.[10] State Blue Sky laws, enacted in some form in 47 States, failed to stamp out this traffic.[11] In 1932 the Senate authorized a comprehensive investigation of stock-exchange practices, and subsequently expanded the scope of its inquiry to include banking operation and practices and the business of issuing, offering, and selling securities.[12] As a result of the information obtained during the course of this investigation, and in response to a special message transmitted to Congress by the President recommending Congressional action,[13] the present Securities Act was enacted on May 27, 1933 (c. 38, 48 Stat. 74).

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[10] The annual total has been estimated to be $1,700,000,000, and the total of the past ten years to be $25,000,000,000. Sen. Rep. No. 47, 73d Cong., 1st Sess., p. 2.

[11] As early as 1924, the National Association of Securities Commissioners, an organization of officers charged with the enforcement of the State laws had adopted a resolution urging the passage of a Federal act regulating the interstate sale of securities, and has since that time constantly been confronted with the problem of regulating interstate frauds effected by the use of the mails, the telephone, the telegraph, and the radio. See President's Report, *Proceedings of the National Association of Securities Commissioners* (1933) pp. 21–22. See also H. R. Rep. No. 85, 73d Cong., 1st Sess., p. 1; Sen. Rep. No. 47, 73d Cong., 1st Sess., p. 2. The Securities Act has met with the approval of these officers. See *Proceedings, National Association of Securities Commissioners* (1933) pp. 22–23; *id.*, (1934) p. 45.

[12] See Sen. Rep. No. 1455, *supra*, note 6, at pp. 1–3.

[13] H. R. Rep. No. 85, 73d Cong., 1st Sess., p. 1.

The Act is entitled "An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The stated purposes are accomplished by three main provisions. Section 5 forbids the sale of new issues of securities by means of the facilities of the mails or of interstate commerce unless a statement is on file disclosing all material information covering the issue. Sections 11 and 12 make officers, directors and underwriters civilly liable for any departure from the standards imposed by the Act. Section 17 prohibits all fraudulent devices in connection with the offering or sale of any security through the mails or in interstate commerce. All other sections of the Act are ancillary to these three provisions.

For purposes of determining the validity of the present order, the only section which is material is Section 5 (a), which provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate com-

> merce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.[14]

The constitutional issue is further narrowed by the manner in which it is presented in the present case. Petitioner, without waiting for a specific question to be put to him, has flatly refused to appear before the Commission, and has thereby indicated that he is unwilling to answer any question that he might be asked. To maintain his position, therefore, petitioner must demonstrate that there is *no* purpose for which Congress can validly require that petitioner appear before the Commission and be questioned regarding his registration statement. Cf. *Bevan* v. *Krieger,* 289 U. S. 459, 465; *Blair* v. *United States,* 250 U. S. 273.

An analysis of Section 5 (a) reveals that the section does not purport to require registration of a security as a condition precedent to every transaction concerning that security. Registration is required as a condition precedent only to such transactions[15] relating to the sale of the security as involve (1) the use of the *mails;* (2) the use of means

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[14] Certain exemptions from the provisions of Section 5 are contained in Section 3 and Section 4 of the Act. These exemptions are not material to the present case.

[15] Transactions are subject to Section 5 only when the person engaging in them is an issuer, underwriter, or dealer, and in certain circumstances transactions even by such persons are exempt. Section 4.

or instruments of *transportation* in interstate commerce; and (3) the use of means or instruments of *communication* in interstate commerce.

It is plain that if the Congress has constitutional power to require registration as a condition precedent to any one of these courses of action, the requirement as applied to petitioner is valid. It is further evident that if registration may properly be required, reasonable examination of registrants in connection with such registration is lawful. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 42. As has been demonstrated above (*supra*, pp. 17–19), the examination of registrants, despite attempted withdrawal of their registration statements, is reasonably related to, and necessary for, the proper enforcement of the registration provisions. Thus, since some examination is clearly appropriate in connection with valid registration requirements, the order of the lower court must be sustained if registration may be required under the authority of Congress either to regulate the postal system or to regulate interstate commerce.

A. THESE PROVISIONS OF THE SECURITIES ACT ARE A PROPER EXERCISE OF THE POWER OF CONGRESS TO ESTABLISH POST OFFICES AND POST ROADS

One of the expressed purposes of the Securities Act, as stated in its title, is "to provide full and fair disclosure of the character of securities sold

* * * through the mails." To this end, Section 5 (a) contains two separate provisions. By Section 5 (a) (1) an effective registration statement is made a prerequisite to the "use * * * of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise." By Section 5 (a) (2) the registration statement is made necessary before any person may "carry or cause to be carried through the mails * * * any such security for the purpose of sale or for delivery after sale." It will be necessary, for purposes of the present case, to discuss only the latter. See pp. 32-33, *supra*. Respondent submits that such a requirement is clearly within the scope of Congressional authority, as shown by the prior decisions of this Court.

Petitioner does not challenge the settled doctrine that the power of Congress "to establish post-offices and post-roads" is plenary, embracing the power to regulate the entire postal system. Nor does he challenge the rule that in the exercise of this power Congress has wide discretion as to the matter which shall be carried and that which shall be excluded from the mails. Indeed, the rule is settled beyond the possibility of dispute. *Ex parte Jackson*, 96 U. S. 727; *Ex parte Rapier*, 143 U. S. 110; *Badders* v. *United States*, 240 U. S. 391.

This power of Congress is not limited to excluding from the mails only those things which are deemed injurious to the postal service or personnel. In *Ex parte Jackson, supra*, a conviction for viola-

tion of a statute prohibiting the use of the mails in connection with a lottery was sustained, the Court holding that it was proper for the postal service "to refuse its facilities for the distribution of matter deemed injurious to the public morals" (p. 736). This decision was followed in another lottery case, *Ex parte Rapier, supra,* in which Mr. Chief Justice Fuller restated the view of the Court (p. 134):

> When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mail in aid of the perpetration of crime or immorality.

A like result was reached in *Badders* v. *United States,* 240 U. S. 391, in which the defendant had been indicted for placing letters in the mail for the purpose of executing a scheme to defraud. His argument in defense, that the law went beyond the powers of Congress as applied to a mere incident of a fraudulent scheme which was itself beyond the jurisdiction of Congress, was answered by Mr. Justice Holmes (p. 393):

> The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte*

> *Jackson,* 96 U. S. 727. Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.

Other cases, which need not be discussed in detail, have sustained the power of Congress to exclude from the mails obscene and indecent matter (*United States* v. *Chase,* 135 U. S. 255; see *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508), lottery tickets (*Horner* v. *United States,* 143 U. S. 207; *id.,* 570) and matter of a seditious nature (*Coomer* v. *United States;* 213 Fed. 1 (C. C. A. 8). Cf. *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407). Additional authorities are collected at p. 40 of petitioner's brief.

In preventing misuse of the mails, Congress is not limited to prescribing punishment for those who use them for transmitting undesirable matter or for the furtherance of fraudulent schemes. It may employ more positive sanctions, such as preventing the delivery of mails to one who is engaged in such practices. In *Public Clearing House* v. *Coyne,* 194 U. S. 497, a statute was challenged which authorized the Postmaster General to order the local postmaster to return all mail addressed to anyone who was shown by satisfactory evidence to be engaged in conducting a lottery or any other device for obtaining money through the mails by fraud. In affirming the denial of an injunction against the local postmaster who was acting pur-

suant to the "fraud order" of the Postmaster General, Mr. Justice Brown said (pp. 507–508):

> While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality.

The requirements of Section 5 (a) embody a regulation which is not only better adapted to the control of fraud than the "fraud orders" sustained in *Public Clearing House* v. *Coyne, supra,* but also one which is less severe in its operation. Whereas the effect of a "fraud order" is to prohibit fraudulent persons from receiving *any* mail, the registration requirement merely prohibits a person from sending through the mail such securities as he does not choose to describe truthfully. Moreover the preliminary sifting involved in this latter form of regulation has the double advantage that it inflicts no burden upon innocent

communications, and that it operates with the effectiveness characteristic of control that precedes and prevents wrongful action.

In many cases the certificate itself, the mailing of which is forbidden, will be noxious because of the untrue statements or misrepresentations which it contains.[16] Certainly Congress may punish one who deposits in the mails such harmful certificates. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143 U. S. 110. And it may also punish one who deposits in the mail securities which, though themselves harmless, are being used to effectuate a fraudulent scheme. *Badders* v. *United States,* 240 U. S. 391.

Petitioner, however, while not seriously controverting the power of Congress to bar from the mails securities which are themselves noxious, or which are an integral part of a fraudulent scheme, urges that the manner in which the regulation is accomplished by Section 5 (a) of the present Act is beyond the postal power of Congress because the requirement of registration is imposed with respect to all securities which are transmitted

[16] Apparently the Certificates which petitioner proposes to issue are of this character. These Certificates (R. 62–63) contain a representation that "the rights and obligations of the Trustee are fully set forth in the Trust Agreement, a copy of which is on file with the Trustee." Yet the truth of this representation is directly challenged by the Commission, which states that it has reason to believe that the Trustee receives from petitioner an undisclosed additional fee. (See Commission's Application for Order, Paragraph V, Specification 10, R. 10.) If this be true, it would seriously affect the value of the Certificates.

through the mails, and is not limited to those securities which may in fact be fraudulent. It is well established, however, that in the exercise of its enumerated powers Congress may take such steps as are reasonably necessary to accomplish its purpose. Indeed, if the rule were otherwise, it would in many cases be impossible for any regulation effectively to be imposed. A close analogy is presented by *Public Clearing House* v. *Coyne, supra.* The "fraud order" forbidding the receipt of mail by the petitioner in that case applied to all mail addressed to the petitioner and was not limited to mail connected with the fraudulent enterprise. Answering the objection that such an order was unconstitutional, Mr. Justice Brown said (p. 510):

> Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. * * * A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.

Similar cases involving the exercise of other powers of Congress, or of the States, have sustained

measures having a reasonable relation to the end sought to be accomplished. The statement in *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201, may be regarded as typical:

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

See also *Ruppert* v. *Caffey,* 251 U. S. 264, 282, 299; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Merrick* v. *Halsey & Co.,* 242 U. S. 568, 587.

The further argument of petitioner that the Act is in excess of the postal power of Congress because a requirement of full disclosure of the material facts covering a new issue of securities will not bar *all* fraudulent securities from the mails needs only a brief answer. Certainly full disclosure will aid in reducing the immense number of securities which are marketed by misrepresentation and concealment, and the fact that Congress has chosen to limit its control to frauds of that sort is no reason to conclude that it has exceeded its powers. "The power may be determined by degrees of evil or ex-

ercised in cases where detriment is specially experienced." *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 557.

Petitioner urges, however, that even though the present Act be ostensibly within the postal power of Congress, it nevertheless is invalid because (1) it invades the powers reserved to the states and to the people by the Tenth Amendment and (2) it is in violation of the due process clause of the Fifth Amendment. Respondent submits that the objections are without weight.

Petitioner's argument that Section 5 (a) of the Act is in conflict with the Tenth Amendment is apparently based upon the contention that the effect of the Act is to regulate persons and business practices within the States. The contention seems to have been adequately answered by the cases already discussed. This Court has several times pointed out that it is not necessary that Congress have the power to deal with crime or immorality within the States in order to forbid the use of the mails to matter which it deems contrary to the public welfare. See *Ex parte Rapier, supra,* at p. 134; *Badders* v. *United States, supra,* at p. 393.

Nor can it be urged that Section 5 (a) is unconstitutional because it applies to the persons using the mails rather than the thing mailed, and so constitutes an attempt by regulation of the mails to extend Congressional power beyond its proper scope.

Actually, to the extent that Section 5 (a) (2) requires registration before the securities themselves may be mailed, which is the only phase of the Act with which we are here concerned, the primary application of the regulation is upon the security, not upon the person. The regulation upon the person, if there may be said to be any, is strictly limited to his use of the mails, a matter within Federal jurisdiction. The argument attempted by the petitioner would seem to be entirely inconsistent with *Badders v. United States, supra,* in which the overt act of mailing a letter, in itself innocent, but in furtherance of a scheme to defraud, was held to be within the power of Congress to punish. Clearly, the impact of such Congressional regulation is on the person mailing rather than on the object mailed. Similarly, in *Public Clearing House* v. *Coyne, supra,* the operation of the "fraud order" which prohibited the delivery of all letters to an addressee found to be conducting a fraudulent enterprise fell upon the addressee rather than upon the letters mailed.

This conclusion is in no way inconsistent with *Hammer* v. *Dagenhart*, 247 U. S. 251. In that case the court decided that Congress, by the ostensible exercise of its power on interstate commerce was attempting to control activity which was wholly the concern of the States. *Hammer* v. *Dagenhart,* however, has never been considered inconsistent with

the power of Congress to close the channels of interstate commerce to objects which it deemed noxious, and harmful to the people in other States to which they would otherwise be transported. *Lottery Case,* 188 U. S. 321; *Reid* v. *Colorado,* 187 U. S. 137; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Caminetti* v. *United States,* 242 U. S. 470; *Pittsburgh Melting Co.* v. *Totten,* 248 U. S. 1; *Brooks* v. *United States,* 267 U. S. 432; *Thornton* v. *United States,* 271 U. S. 414. A similar rule must be applicable to the power of Congress to close the mails to matter which it believes is contrary to the public welfare.[17]

Petitioner's final contention is that the registration requirements of the Act violate the due process clause of the Fifth Amendment. It has, of course, always been recognized that the plenary power of Congress over the mails is subject to the general limitations of the Bill of Rights. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143 U. S. 110; *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 430. However, within their respective jurisdictions, many States of the

[17] The care with which Congress has avoided any interference with purely local matters is exemplified by Section 3 (11), which exempts from the scope of the Act "Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory."

United States, and many foreign countries, have imposed a similar requirement of registration in order to prevent sales of fraudulent securities.[18] State laws of this sort have been held consistent with the due process clause of the 14th Amendment. *Merrick* v. *Halsey & Co.*, 242 U. S. 568; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559. Cf. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. A similar requirement by the Federal Government does not violate the Fifth Amendment.

Moreover, a substantially similar requirement of full disclosure of material information has been sustained in connection with the power of Congress to classify mailable matter. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, presented the constitutionality of an Act of Congress denying the low rate privilege of second-class mail to newspapers who did not file with the Postmaster General, and publish annually, a list of its owners, stockholders, bondholders, circulation, and principal creditors, and who did not mark all paid reading matter as advertisement. The classification was sustained, although, in effect, the denial of second-class privilege to newspapers was tantamount to exclusion from the mails. See Mr. Justice Brandeis, dissenting, in *United States ex rel. Milwaukee Publishing Co.* v. *Burleson, supra,* at 431.

[18] A complete collection of State Blue Sky laws may be found in Stocks and Bonds Law Service (131 and 132 Commerce Clearing House), Vols. I and II.

B. THESE PROVISIONS OF THE SECURITIES ACT ARE A PROPER EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

Another of the expressed purposes of the Securities Act, as stated in its title, is "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce". To this end, Section 5 (a) contains two separate provisions. By Section 5 (a) (1) an effective registration statement is made a prerequisite to the "use of any means or instruments of transportation or communication in interstate commerce * * * to sell or offer to buy such security through the use or medium of any prospectus or otherwise". By Section 5 (a) (2) the registration statement is made necessary before any person may "carry or cause to be carried * * * in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale". It will be necessary, for purposes of the present case, to discuss only the latter. If either prohibition be valid, then, as pointed out at pages 32–33, *supra,* the petitioner has failed to maintain the position essential to his case, that registration of securities cannot be required by Congress for any purpose whatsoever.

The Commission contends that the prohibition upon the interstate transportation of unregistered securities is valid inasmuch as (1) securities are subjects of commerce; and (2) the prohibition of

the interstate transportation of unregistered securities is a valid exercise of Congressional power "to regulate commerce among the several States."

1. SECURITIES ARE SUBJECTS OF COMMERCE

The Commission contends that shares of stock, bonds, trust certificates, and similar securities should be classified as subjects of commerce, both because of their inherent nature and because of their general resemblance to what this Court has already adjudged to be subjects of commerce.

Securities may be regarded as being property in themselves, as they are by the Uniform Stock Transfer Act [19] and by the declaration of trust here

[19] The Uniform Stock Transfer Act provides that "title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate" properly indorsed. (Section 1.) The result is that trading takes place only when the certificate is available; attachments and levies are possible only when the certificate is seized (Section 13); liens or restrictions are not recognized unless they are indicated on the certificate (Section 15); and in almost every possible way the certificate is treated as the share itself. This Act has been adopted by nearly half the states, including all the leading commercial states.

Alabama, Laws 1931, No. 483; Alaska, Laws 1913, ch. 67; Arkansas, Laws 1923, act 387; California, Stats. 1931, p. 1790; Colorado, Laws 1927, ch. 81; Connecticut, Laws 1917, ch. 325; Idaho, Laws 1927, ch. 88; Illinois, Laws 1917, p. 316; Indiana, Laws 1923, ch. 24; Louisiana, Laws 1910, No. 180; Maryland, Laws 1910, ch. 73; Massachusetts, Laws 1910, ch. 171; Michigan, Laws 1913, No. 106; Minnesota, Laws 1933, ch. 331; New Jersey, Laws 1916, ch. 191; New York, Laws, 1913, ch. 600; Ohio, Laws 1911, p. 500; Pennsylvania, Laws 1911, p. 126; Rhode Island, Laws 1912, ch. 840; South Dakota, Laws 1921, ch. 159; Tennessee, Laws 1925, ch. 91; Utah, Laws 1927, ch. 55; Virginia, Laws 1924, ch. 482; Wisconsin, Laws 1913, ch. 458.

involved [20] or they may be regarded merely as interests in property. In either case they should be held to be subjects of commerce because they are by common business usage treated and dealt in as such. "Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." *Swift and Co.* v. *United States,* 196 U. S. 375, 398.

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[20] Petitioner's argument (Br. pp. 13–15) that the securities registered by him are "oil royalties", and hence incorporeal interests in Oklahoma real estate, is manifestly unsound. Petitioner's registration statement showed that petitioner, as "sponsor" of the trust, was to deposit oil royalties in trust with a Trustee, and against the royalties so deposited the Trustee was to issue "Participation Trust Certificates in producing oil royalties" (R. 33). The statement was filed on the Commission's Form C–1, applicable to the securities of investment trusts (R. 33), rather than on Form G–1 or G–2, applicable to oil royalties. The certificates are made freely transferrable (R. 62, 65); and the Trustee is by the terms of the declaration of trust required to transfer or exchange them when properly endorsed and presented (R. 62–63, 64–65). After transfer, the new holder has absolute ownership (R. 66) and the exclusive right to receive payments of income and distributions of capital on this share of the property in trust (R. 65–66).

These certificates satisfy the definition of a security stated in Section 2 (1) of the Securities Act ("certificates of participation in a profit-sharing agreement"; "instrument commonly known as a 'security' "), and they have been held to be securities under substantially similar definitions in State Blue Sky laws. *Barnhill* v. *Young*, 46 F. (2d) 804 (S. D. Cal.). *Barrett* v. *Gore*, 88 Cal. App. 372; *People* v. *Ferguson*, 24 P. (2d) 965, 969 (Cal. App., not officially reported); *State* v. *Summerland*, 150 Minn. 266; *Freeze* v. *Smith*, 254 Mich. 386; *Ross* v. *Couden*, 22 Oh. App. 330.

Indeed measured even by technical legal conceptions formulated in previous cases, securities have "real or substantial value in themselves", and have "a money value in the market among those who chose to sell or buy." *Lottery Case,* 188 U. S. 321, 353, 354. They are not mere indemnities for a consideration. *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, 508. On the contrary, they are "subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are * * * commodities to be shipped or forwarded from one State to another, and then put up for sale." Often, as in the case of so-called street certificates, without requiring a "signature" to complete this transfer. *Paul* v. *Virginia,* 8 Wall. 168, 183.

Not only are securities inherently subjects of commerce, but also in many respects they resemble the lottery tickets which were held to be subjects of commerce in the *Lottery Case, supra.* In that case this Court upheld a Federal statute making it a crime to cause a lottery ticket to be carried from one State to another. In disposing of a contention that lottery tickets were not subjects of commerce, Mr. Justice Harlan said (pp. 353–354):

> It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be

deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895.

The language of this quotation is peculiarly apposite to securities, for they also are "the subject of

traffic," "could have been sold," and "had a money value in the market among those who chose to sell or buy."

Another comparable case is *International Textbook Co.* v. *Pigg,* 217 U. S. 91. There a foreign corporation engaged in conducting a correspondence school resisted conditions and taxes imposed by the State of Kansas on the ground that it was engaged exclusively in interstate commerce. The evidence showed that the corporation from its Pennsylvania office regularly sent to its scholars in Kansas "books, apparatus and papers useful or necessary in the particular course of study the scholar is pursuing" (p. 106). On this evidence the Court sustained the corporation's contention that in carrying on its activities in Kansas, it was engaged exclusively in interstate commerce.[21]

If the transportation of information together with school books and school papers is interstate commerce, then *a fortiori* the transportation of securities (which not only serve as information as to the rights of the holders, but also themselves have value) is interstate commerce.

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[21] The rationale of *International Textbook Co.* v. *Pigg, supra,* that where a business involves the continuous transmission across State lines of information, documents, or persons, the business is interstate commerce, has been applied with respect to both federal legislation, *Ramsay Co.* v. *Bill Posters Assn.,* 260 U. S. 501; *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 501; *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 F. (2d) 113 (C. C. A. 6), and state legislation, *Bay City* v. *Frazier,* 77 F. (2d) 570 (C. C. A. 6).

Reference should also be made to those cases which considered the validity of state Blue Sky laws under the commerce clause. In a series of six cases, all of which antedated the first decision of this Court upon the subject, six 3-judge District Courts unanimously held that securities were subjects of commerce. *Alabama & New Orleans Transportation Co. et al.* v. *Doyle,* 210 Fed. 173, 182–183 (E. D. Mich.); *William R. Compton Co.* v. *Allen,* 216 Fed. 537, 546–547 (S. D. Iowa); *Bracey* v. *Darst,* 218 Fed. 482, 495–496, 498 (N. D. W. Va.); *N. W. Halsey & Co.* v. *Merrick,* 228 Fed. 805, 806 (E. D. Mich.); *Geiger-Jones Co.* v. *Turner,* 230 Fed. 233, 238 (S. D. Ohio); *Sioux Falls Stock Market Co. et al.* v. *Caldwell,* no opinion, but decree reported at 230 Fed. 236 (D. S. D.).

When the issue finally reached this Court the state Blue Sky laws were held valid and not repugnant to the commerce clause. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 557–558; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568. Although not deciding whether securities were subjects of commerce, this Court intimated that it regarded them as such, and disagreed only with the lower courts' finding that the state statutes were a burden on commerce. See particularly the language of Mr. Justice McKenna in 242 U. S., at pages 557–558. See also *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 161, in which Mr. Justice Holmes recognized that a certifi-

cate of stock "was more than evidence, it was a constituent of title." [22]

To refute the contention that securities are subjects of commerce the petitioner invokes the cases beginning with *Paul* v. *Virginia,* 8 Wall. 168, and culminating in *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, which hold that the commerce clause does not prevent a State from regulating the insurance business since contracts of insurance are not subjects of commerce. But cases dealing with insurance are not persuasive authority with respect to securities. As the insurance cases themselves carefully emphasize, insurance contracts are not regarded as subjects of commerce because they are "contracts of indemnity", "not subjects of trade and barter offered in the market as something having an existence and value inde-

[22] It is generally held that certificates of stock are "goods, wares, and merchandise" within the meaning of the Statute of Frauds. Thus in *Tisdale* v. *Harris*, 20 Pick. 9, Chief Justice Shaw said (p. 13): "The word 'merchandise' also, *including in general, objects of trade and commerce*, is broad enough to include stocks or shares in incorporated companies." [Italics added.] See also *Illinois-Indiana Fair Assn.* v. *Phillips*, 328 Ill. 368, 374, and cases therein collected; *Williston on Contracts*, Vol. I, Sec. 251; Uniform Laws Annotated, Vol. 1, p. 27. Some important commercial jurisdictions also hold that a sale of corporate stock is a sale of goods within the meaning of the Uniform Sales Act. *Wills* v. *Investors Bankstocks Corp.*, 257 N. Y. 451, 456–457; *Postel* v. *Hagist*, 251 Ill. App. 454, 466. Cf. *Edwards* v. *Ioor*, 205 Mich. 617, 623. On this latter point there is, however, a division of authority. Uniform Laws Annotated, Vol. 1, p. 15. See also *Banta* v. *City of Chicago*, 172 Ill. 204, which construes an analogous ordinance.

pendent of the parties to them." *Paul* v. *Virginia, supra,* at p. 183; *New York Life Insurance Co.* v. *Deer Lodge County, supra,* at p. 508. By the very canons which have been used to prove that insurance contracts are *not* subjects of commerce, it is apparent that securities *are* subjects of commerce.

The petitioner also relies upon a number of isolated cases for the proposition that securities are not subjects of commerce. *Nathan* v. *Louisiana,* 8 How. 73; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152; *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593; *Hemphill* v. *Orloff,* 277 U. S. 537. Upon analysis, it appears that these cases do not support the proposition, or discuss the scope of Congressional power under the commerce clause. Most of them are concerned only with the question of the extent of State power.

In *Nathan* v. *Louisiana,* 8 How. 73, the precise ruling of the Court was that it was not repugnant to the commerce clause for the State of Louisiana to impose an occupation tax upon a broker whose business was buying and selling within the State of Louisiana so-called "foreign bills of exchange," that is, bills drawn on persons living in States other than Louisiana. With regard to this case it is important to note (1) that as counsel for the State of Louisiana pointed out (p. 79), the taxpayer did not introduce evidence showing that the particular bills in which he dealt were ever outside of the State of Louisiana, much less that the transactions

by which he bought or sold them were transactions requiring the delivery of the bills across state lines; (2) even if the bills of exchange had been tangible goods, and had been brought from a sister State, there would have been no valid objection under the commerce clause to a state occupation tax, *Woodruff* v. *Parham*, 8 Wall. 123; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; and (3) that the general course of dealing in securities today cannot accurately be described in the way the business of dealing in bills of exchange was described in 1850. No court would now say that modern securities are "not transmitted through the ordinary channels of commerce", or are "worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable.". See footnote 24, on page 57, *infra*.

New York ex rel. Hatch v. *Reardon*, 204 U. S. 152, held that the commerce clause does not prevent the State of New York from imposing a non-discriminatory stamp tax upon a sale made in New York, by a resident of Connecticut to another resident of Connecticut, of shares of stock in corporations organized under the laws of Virginia and Wisconsin. The Court, although recognizing that securities were subjects of commerce; see pp. 51–52, *supra*, held that the particular transaction was not "commerce *between the States*" (p. 161).

Ware & Leland v. *Mobile County*, 209 U. S. 405, held that the State of Alabama could, without violating the commerce clause, require a license tax to be paid by brokers in Alabama whose sole busi-

ness was to receive from customers in Alabama orders for sales of cotton for future delivery, and to transmit those orders to other States where the contract for sale, and the subsequent delivery, if any, would be made. This case was concerned not with shares of stock or bonds, but with contracts for future delivery. One who makes a contract for future delivery (whether the commodity be cotton, grain, or shares of stock) ordinarily considers that the barter and trade relate to the commodity rather than to the contract itself. In ordinary business usage, persons talk of the commodity rather than of the contract as the "subject of commerce." Moreover, the particular contracts involved in the *Ware & Leland* case did not require "necessarily any movement of commodities in interstate traffic" (209 U. S. at 413).

Moore v. *New York Cotton Exchange,* 270 U. S. 593, held that transactions on the New York Cotton Exchange, a market for the purchase and sale of future cotton contracts, were "purely local in their inception and in their execution" since "if interstate shipments are actually made, it is not because of any contractual obligation to that effect." This case is distinguishable for the same reasons as *Ware & Leland* v. *Mobile County,* and for the further reason that it involved not the extent of the commerce power of Congress, but the extent of the exercise of that power in the Clayton Act. In view of *Board of Trade* v. *Olsen,* 262 U. S. 1, it cannot be doubted that for some purposes fu-

ture commodity contracts are within the power of Congress to regulate commerce.

In *Hemphill* v. *Orloff*, 277 U. S. 537, s. c. 238 Mich. 508, a Massachusetts business trust contended that since it was engaged exclusively in interstate commerce, it could do business in the State of Michigan without that State's consent and without complying with its statutes relating to foreign corporations. The proof convincingly showed that "the Trust was carrying on the business of dealing in negotiable notes within the State of Michigan" (277 U. S. at 550), and that most of the transactions were "executed in Detroit . . . upon property located in Detroit" (238 Mich. at 526). In view of this proof upon which the lower court had made an express finding that the trust "was doing business in the State" (238 Mich. at 526), it was not necessary to decide whether interstate transactions in securities could constitute interstate commerce.

The foregoing analysis reveals that none of these cases relates to the exercise of *federal* power over the transportation of securities.[23] They involve merely the extent to which state power may in varying ways affect the security business. The line which marks the point at which state taxation or regulation becomes permissible does not establish

[23] *Moore* v. *New York Cotton Exchange*, *supra*, p. 55, merely decided to what extent Congress had in fact exercised its power over trading in future commodity contracts. It was already clear that trading in such contracts was for some purposes within the commerce power of Congress. *Board of Trade* v. *Olson*, 262 U. S. 1.

the limit to which the power of Congress can extend in preventing abuses of commerce among the States. *Swift & Co. v. United States,* 196 U. S. 375, 400; *Stafford v. Wallace,* 258 U. S. 495, 525; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311. Moreover, in all of these cases, with the possible exception of *Nathan* v. *Louisiana, supra,* the chief point was whether the particular facts in the case necessarily involved any *interstate* transportation. No similar doubt can exist with respect to the security business considered as a whole. It cannot be doubted that interstate transportation is a usual, and often a necessary,[24] method of selling securities. And in such sales all parties regard the securities as subjects of commerce.

[24] It is well known that under modern conditions many securities are distributed to the public through selling groups formed by investment bankers, and are later traded in on public stock exchanges. In each of these two stages interstate transportation is customary. The Senate Committee on Banking and Currency in its report on stock exchange practices (73d Cong., 2d Sess., Report No. 1455) described the final step in the distribution of a new offering in these words (Chapter II, p. 93): "The final group is a selling group or syndicate, composed of investment dealers *throughout the country* who effect the ultimate merchandising operation and place the issue in the hands of the investing public." (Italics supplied.) And in reference to trading on stock exchanges the Committee's Report pointed out (p. 5): "It is evident that a business of such stature not only entails the use of the mails and other instrumentalities of interstate commerce but itself constitutes an important part of the current of interstate commerce." Although these quotations are from a Senate report which was not limited to the particular statute now under review, they state facts which are of general knowledge.

2. THE PROHIBITION OF THE INTERSTATE TRANSPORTATION OF UNREGISTERED SECURITIES IS A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

The provisions of the Securities Act here involved (see p. 45, *supra*) go no further than to require that before a security is transported in interstate commerce,[25] there shall be disclosed to the Securities and Exchange Commission,[26] and hence made available to the public,[27] the salient characteristics of the security.

This disclosure tends to prevent two different sorts of evil: the interstate transportation first of certificates which, like those involved in this case, see footnote 14, page 38, *supra,* are themselves harmful because they bear on their face misrepresentations, and second, the sale of securities which have been otherwise misrepresented.

Prior cases make it clear that these evils are subject to regulation under the commerce clause. Congress may exclude from the channels of commerce articles which are themselves harmful, *Lottery Case,* 188 U. S. 321, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. And it may also forbid the use of channels of interstate commerce to promote dishonesty or immorality, *Brooks* v. *United States* 267 U. S. 42; *Caminetti* v. *United States,* 242 U. S. 470.

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[25] Section 5 (a).
[26] Section 6 (a).
[27] Section 6 (d).

In order to make this regulation effective, Congress may require information with respect to all articles of the same type, *McDermott* v. *Wisconsin*, 228 U. S. 115, 131; *Weeks* v. *United States*, 245 U. S. 618; *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1; *Thornton* v. *United States*, 273 U. S. 414, even though the requirement necessarily embraces innocent articles used only for legitimate purposes. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507–508; *Ruppert* v. *Caffey*, 251 U. S. 264, 282, 289–300; *Everards' Breweries* v. *Day*, 265 U. S. 545, 560.

Several of these cases have already been referred to in the discussion of the postal power (see pp. 39–40, *supra*), and most of the others are summarized in *Brooks* v. *United States*, 267 U. S. 432. In that case, which decided that Congress could make it a federal crime to transport in interstate commerce a stolen automobile, Mr. Chief Justice Taft said (pp. 436–437):

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215. In *Reid* v.

Colorado, 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other States. In the *Lottery Case,* 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In *Hipopolite* [sic] *Egg Co.* v. *United States,* 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other States than the one from which they were transported, would deceive or injure persons who purchased such articles. In *Hoke* v. *United States,* 227 U. S. 308 and *Caminetti* v. *United States,* 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating

liquors into any State in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the State. In *Weber* v. *Freed,* 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the State of destination.

The petitioner attempts to distinguish *Brooks* v. *United States, supra,* and the authorities there reviewed on two grounds: first, that Section 5 (a) excludes from the channels of commerce merely unregistered securities, but does not exclude registered securities that are of no value (Br. pp. 30–31, 22); and second, that Section 5 (a) violates the Tenth Amendment since it is a regulation of conduct within a State, and not of commerce among the States (Br. pp. 23, 28).

In the discussion of the postal power, it has been shown that the first distinction is true but of no legal significance, pages 40–41, *supra,* and that the second distinction is unsound, pages 41–42, *supra.* The clause in Section 5 (a) which covers transportation of securities is clearly limited to "transportation in *interstate commerce.*"

Unlike the Child Labor Law considered in *Hammer* v. *Dagenhart,* 247 U. S. 251, the registration provisions of the Securities Act do not attempt to regulate or standardize local conditions under

which articles are produced and do not attempt to induce any change in local law.[28] (See 247 U. S. 272.) Section 5 (a) leaves the channels of commerce open to any security whatsoever, regardless of how it was created, what it is worth, or on what terms it is sold. The present statute is parallel not to the Child Labor Law, but to the Lottery statute, the Pure Food and Drug Act, and similar federal statutes which were distinguished in *Hammer* v. *Dagenhart* (at p. 271) on the ground that they prevented "the use of transportation * * * necessary to the accomplishment of harmful results", and which were invoked in *Brooks* v. *United States, supra* at p. 436) as precedents for "forbidding and punishing the use of * * * commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin."

It has already been pointed out at page 44, *supra,* that the requirement that securities be registered in advance of transportation does not deprive petitioner of liberty or property without due process of law. *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568; cf. *Hall* v. *Geiger-Jones,* 242 U. S. 539.

[28] Section 18 of the Securities Act provides: "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

CONCLUSION

Wherefore, it is respectfully submitted that the decree of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Securities Act of 1933 (C. 38, 48 Stat. 74, U. S. C., Title 15, Sec. 77a *et seq.*), as amended by Act of June 6, 1934, c. 404, 48 Stat. 881, 905)

AN ACT To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, tempo-

rary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Federal Trade Commission.

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of Section 10 was sent or given to the person to whom the communication was made, by the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the

District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing, or any security issued or guaranteed by any national bank, or by any banking institution organized under the laws of any State or Territory or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or Territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve Bank;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substan-

tially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common carrier which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms

and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the

security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in inter-

state commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person

whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement ~~may~~ be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Com-

mission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

SEC. 8. (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the send-

ing of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the

Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United

States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be

final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) When a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use, so far as such information is known to the user of such prospectus or can be fur-

nished by such user without unreasonable effort or expense.

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules

and regulations require the filing with it of forms and prospectuses used in connection with the sale of securities registered under this title.

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with

the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him.

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or cease or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken

such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact

required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not

fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in

value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover con-

tribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to re-

cover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than three years after the security was bona fide offered to the public, or under section 12 (2) more than three years after the sale.

CONTRARY STIPULATIONS VOID

SEC. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall

also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

ADDITIONAL REMEDIES

SEC. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the

use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the ap-

praisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers,

or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under

this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

SEC. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may

be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but

no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

SEC. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more

than $5,000 or imprisoned no more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 27. Upon the expiration of sixty days after the date upon which a majority of the members of the securities and exchange commission appointed under Section 4 of Title I of this act have qualified and taken office, all powers, duties and functions of the Federal Trade Commission under the Securities Act of 1933 shall be transferred to such commission, together with all property, books, records and unexpended balances of appropriations used by or available to the Federal Trade Commission for carrying out its functions under the Securities Act of 1933. All proceedings, hearings or investigations commenced or pending before the Federal Trade Commission arising under the Securities Act of 1933 shall be continued by the Securities and Exchange Commission. All orders,

rules and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed. All rights and interests accruing or to accrue under the Securities Act of 1933, or any provision of any regulation relating to, or out of action taken by, the Federal Trade Commission under such act, shall be followed in all respects and may be exercised and enforced.

SEC. 28. The Commission is authorized and directed to make a study and investigation of the work, activities, personnel, and functions of protective and reorganization committees in connection with the reorganization, readjustment, rehabilitation, liquidation, or consolidation of persons and properties and to report the result of its studies and investigations and its recommendations to the Congress on or before January 3, 1936.

SCHEDULE A

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the

issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in

connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation

therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public,

and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or

which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a

date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant,

meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or if identic agreements are used the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing by-laws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association

and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certicates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt,

rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

Approved May 27, 1933.

51863—30——8

Release No. 47

For Immediate Release, Friday, September 22, 1933

FEDERAL TRADE COMMISSION, WASHINGTON

SECURITIES ACT OF 1933

The Federal Trade Commission announces adoption of a rule under the Securities Act conferring certain powers upon the person who is designated in each registration statement as authorized to receive all communications from the Commission concerning the security issue filed for registration.

According to the new ruling, such person shall have power to amend the registration statement by altering to a subsequent date the date of the proposed offering of the securities registered; power to withdraw the registration statement or amendments thereto; and power to consent to entry of an order by the Commission prior to effective date of the registration refusing to permit the registration statement to become effective until it has been amended in accordance with the order.

A consent order entered by the Commission under this ruling is to be "Without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate * * *."

Accompanying the rule is an explanatory note covering the arbitrary delaying of the proposed date of offering of a security in instances where the registration statement is incomplete or inaccurate but "can be corrected with ease by an amendment." The purpose is to permit of a method whereby an extension of 20 days can be afforded a registrant so as to allow him, without threat of stop order proceedings, time to make and file the necessary amendments. The procedure is designed with the idea of permitting the Commission not to make a record against a registrant who, the Commission has reason to believe, is ready to conform to the act. Under this procedure the Commission can afford him sufficient time to make his registration statement conform to the act, at the same time preventing him from selling securities until the necessary amendments shall have been made.

Other rules adopted by the Commission pertain to (1) the withdrawal of a registration statement or an amendment thereto, (2) amendments filed pursuant to an order of the Commission, (3) a definition of "distribution" as used in Section 2 (11) of the act, and (4) the incorporation by reference of exhibits filed with previous registration statements. The purpose of the last-named rule is merely to facilitate the second and subsequent registrations, and to avoid a filing of unnecessary exhibits with such registrations.

Full text of the new rules is as follows:

AMENDMENTS FILED PURSUANT TO AN ORDER OF THE COMMISSION

An amendment made prior to the effective date of the registration statement shall be deemed to have been made pursuant to an order of the Com-

mission within the meaning of Section 8 (a) of the Securities Act so as to be treated as part of the registration statement only when the Commission shall after the filing of such amendment find that it has been filed pursuant to its order.

WITHDRAWAL OF REGISTRATION STATEMENT OR AMENDMENT THERETO

Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

CONFERRING OF POWERS OF AMENDMENT, WITHDRAWAL AND ENTRY OF CONSENT ORDER

(1) All registrants shall hereafter confer upon the person designated in the registration statement as the person authorized to receive service and notice of all notices, orders, communications, and other documents which may be issued by the Commission in connection with the registration statement,

(a) a power to amend the registration statement by altering to a subsequent date of the proposed offering of the securities for which the registration statement is filed; and

(b) a power to withdraw the registration statement or all amendments thereto, or an amendment made by virtue of the power conferred in paragraph (a) above; and

(c) a power to consent to the entry of an order issued under Section 8 (b) of the Securities Act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

(2) The naming of a person in accordance with the forms promulgated by the Commission as a person authorized to receive service and notice of all notices, orders, communications, and other documents which may be issued by the Commission in connection with the registration statement, shall be deemed also, unless there is an express statement to the contrary, as an authorization by the registrant of the person so named as having the powers specified in paragraph (1) of this rule.

Explanatory Note: The Commission upon finding that a registration statement is on its face incomplete or inaccurate or includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, but also finding that such incompleteness, inaccuracy, untruth or omission can be corrected with ease by an amendment, and recognizing that the case is not one that requires immediate steps to be taken to issue an order under Section 8 (b) or 8 (d) of the Securities Act, but recognizing

that it is desirous that no securities for which such registration statement is filed should be legally sold until the necessary amendments shall have been made, may thereupon request the person referred to in the above rule to file an amendment prior to the effective date of the registration statement delaying the proposed date of the offering of the securities for which the registration statement is filed. Such amendment, which may under the above rule be filed by the person named in the above rule, if filed prior to the effective date of the registration statement, will under Section 8 (a) of the Securities Act automatically delay the effective date of the registration statement for twenty days after the filing of such amendment, until and unless some further action is taken by the Commission. The other necessary amendments properly executed may thereafter be forthcoming. Upon their filing the Commission can consent to such filing, with due regard to the public interest and the protection of investors, thereby making such amendments part of the registration statement. Such a procedure does not necessitate delaying the original effective date of the registration statement, if the amendments are duly executed and filed prior to such date. At most, it necessitates a delay in the date of offering the security for one day, and even this day may be eliminated by requesting the withdrawal of the amendment first filed. This procedure permits delaying the coming of an effective date when the registration statement unless amended is inaccurate or incomplete. At the same time it affords a registrant the opportunity to amend without having initiated against him proceedings looking forward to the

issuance of an order under Section 8 (b) or 8 (d). Lack of cooperation on the part of a registrant by failing promptly to make the necessary amendment will require the Commission to initiate proceedings looking forward to the issuance of an order under Section 8 (b) or 8 (d).

A registrant may seek to avoid the making of such an amendment or the initiation of proceedings looking forward to the issuance of an order under Section 8 (b) or 8 (d) by requesting that his registration statement be withdrawn or by requesting that an order of the type specified in paragraph 1 (c) of the rule above be entered.

INCORPORATION BY REFERENCE OF EXHIBITS FILED WITH PREVIOUS REGISTRATION STATEMENTS

The issuer of a security for which a registration statement is in effect may, in filing a subsequent registration statement, incorporate by specific reference such exhibits or parts thereof, which may have been filed with any of its previous registration statements, as it may choose. If the inclusion of additional items would be necessary to make such a reference complete, the issuer will be deemed to have complied with the requirement if, along with the reference, it also files such additional items. If alterations have taken place in any document, a copy of which was filed as an exhibit with a previous registration statement, the copy so filed may be incorporated by reference, if the issuer files along with the reference a statement indicating all deletions, and containing the text of all substitutions and additions, and stating the date or dates on which such changes took effect. The Com-

mission, however, may refuse to recognize any incorporation by reference in any case where in the opinion of the Commission such incorporation by reference is unclear or confusing.

DISTRIBUTION UNDER SECTION 2 (11) DEFINED TO INCLUDE CERTAIN ACTIVITIES

A person, the chief part of the business of which consists in the purchase of the securities of any one issuer, its subsidiary and/or affiliate and in the sale of its own securities to furnish the proceeds with which to acquire the securities of such issuer, subsidiary and/or affiliate, is to be regarded as engaged in the distribution of the securities of such issuer, subsidiary and/or affiliate within the meaning of Section 2 (11).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. M17–191

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

v.

J. EDWARD JONES, RESPONDENT

AFFIDAVIT OF OTIS B. JOHNSON ON BEHALF OF THE APPLICANT

UNITED STATES OF AMERICA,

District of Columbia, ss:

OTIS B. JOHNSON, being duly sworn according to law, deposes and says:

1. That he is the Secretary of the Federal Trade Commission, having been appointed to that office on August 6, 1922;

2. That in such capacity he is in charge of all official records of the Federal Trade Commission, and had the duty of authenticating all regulations of said Commission under the Securities Act of 1933 from May 27, 1933, until September 4, 1934, and that he had the duty of publishing such regulations;

3. That the following regulation regarding withdrawal of registration statements was promulgated by the Federal Trade Commission on September 22, 1933, and was in full force and effect on September 4, 1934, when the administration of the Securities Act of 1933 was transferred from the Federal Trade Commission to the Securities and Exchange

Commission, pursuant to Section 210 of Title II of the Securities Exchange Act of 1934:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

4. That the said regulation was available for public inspection in the public records of the Federal Trade Commission from the date of its promulgation on September 22, 1933, and that it was distributed free of charge to those newspapers and members of the public who were on the mailing list of the Federal Trade Commission or who requested copies of said regulation;

5. That on September 22, 1933, when the said regulation was promulgated and published, there were on the mailing list of the Federal Trade Commission approximately 450 newspaper correspondents which received all releases of the Federal Trade Commission, approximately 470 persons who received all releases of the Federal Trade Commission, approximately 250 persons on a separate list

to receive all releases of the Federal Trade Commission under the Securities Act of 1933, and approximately 100 persons on a separate list to receive all rules and regulations of the Federal Trade Commission under the Securities Act of 1933; that in addition to the foregoing list, copies of Release No. 47 containing the foregoing regulation were always kept available at the offices of the Federal Trade Commission for free public distribution.

Otis B. Johnson.
(Sgd.) OTIS B. JOHNSON.

Subscribed and sworn to before me this 27th day of July 1935.

(Sgd.) EDNA B. VINCIL,
Notary Public, District of Columbia.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. M17–191

SECURITIES AND EXCHANGE COMMISSION, APPLICANT

v.

J. EDWARD JONES, RESPONDENT

AFFIDAVIT OF FRANCIS P. BRASSOR ON BEHALF OF THE APPLICANT

UNITED STATES OF AMERICA,
District of Columbia, ss:

FRANCIS P. BRASSOR, being duly sworn according to law, deposes and says:

1. That he is the Secretary of the Securities and Exchange Commission, having been appointed to that office on August 24th, 1934;

2. That in such capacity he is in charge of all official records of the Securities and Exchange Commission, and has the duty of authenticating all regulations of said Commission under the Securities Act of 1933, and has the duty of publishing such regulations;

3. That the following regulation regarding withdrawal of registration statements, promulgated by the Federal Trade Commission on September 22, 1933, was in full force and effect on September 4, 1934, when the administration of the Securities Act of 1933 was transferred from the Federal Trade Commission to the Securities and Exchange Commission:

> Any registration statement or any amendment thereto may be withdrawn upon the

request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with the date of the giving of such consent and in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

4. That by virtue of Section 210 of Title II of the Securities Exchange Act of 1934, the said regulation was continued in effect until modified, superseded, revoked, or repealed; and that the said regulation has not been modified, superseded, revoked, or repealed by the Securities and Exchange Commission;

5. That the said regulation is included in the compiled regulations of the Securities and Exchange Commission under the Securities Act of 1933, and is distributed free of charge to any person requesting copies of said compiled regulations; more specifically, that the said regulation was published on page 11 of the revised compilation of regulations issued by the Securities and Exchange Commission and its predecessor, the Federal Trade Commission, under the Securities Act of 1933, which revised compilation was published on April 29, 1935, and was and is available for free distribution to any member of the public requesting the same;

6. That approximately 2,700 copies of the aforesaid revised compilation of regulations under the Securities Act of 1933, dated April 29, 1935, have been distributed to members of the public; that copies of said compilation are always kept available for distribution free of charge to any member of the public requesting the same;

7. That no record is available as to the number of persons who have received, by their special request, copies of Release No. 47, which contains the aforesaid regulation concerning the withdrawal of registration statements, but that copies of said release are always available at the office of the Securities and Exchange Commission for free public distribution;

8. That the present mailing list of the Securities and Exchange Commission, to which copies of regulations under the Securities Act of 1933 are sent when promulgated, approximate: 150 newspapers and periodicals, 950 persons who receive the full text of all rules and opinions under the Securities Act of 1933, 1,000 persons who receive all releases of the Securities and Exchange Commission, and 1,700 persons who receive an abstract of the regulations under the Securities Act of 1933; that any member of the public requesting it may be placed on any of these lists free of charge.

Francis P. Brassor.

(Sgd.) FRANCIS P. BRASSOR.

Subscribed and sworn to before me this 27th day of July 1935.

[SEAL] (Sgd.) MARGUERITE M. ALLISON,
Notary Public, District of Columbia.

My commission expires March 1, 1940.

Chronology of J. E. Jones *v.* Securities and Exchange Commission

May 4, 1935: Jones filed with Securities and Exchange Commission a registration statement on Form C–1 (R. 3).

May 20, 1935: Securities and Exchange Commission authorized institution of stop order proceedings against Jones on this registration statement (Pet. Br., p. 68) (R. #639, p. 109).[1]

May 23, 1935: Telegraphic notice of fact that Commission believes that registration statement contains untrue statements, etc., and that a hearing would be held on June 6 "at which time and place registrant may appear and show cause why a stop order should not be issued" (R. 12–13).

May 24, 1935: Petitioner's registration statement became effective.

May 24, 1935: Telegram confirmed by letter (R. 13).

May 25, 1935: Order designating John S. Hurley, an officer of the Commission, "to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require

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[1] Certain of the minutes, orders, etc., necessary to present a complete chronology of the present case are not set out in full in the present record. They may be found in the record of the case which was considered with the present one by the court below, but in which this Court denied certiorari. *Jones* v. *Securities & Exchange Commission*, No. 639, October Term, 1935, certiorari denied February 3, 1936.

the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law" (R. #639, pp. 110–111).

June 1, 1935: Order entered, at request of petitioner, changing date of hearing from June 6, 1935, to June 18, 1935 (R. #639, p. 112).

June 5, 1935: Order changing designation of officer from Hurley to William Green, and empowering him in words identical with those used above for Hurley (R. 14).

June 13, 1935: Subpoena issued to Jones by George C. Mathews, a Commissioner of the Securities and Exchange Commission, requiring him to testify and bring papers on June 18 (R. 90). (The failure to obey this subpoena is not in issue in the present proceeding.)

June 15, 1935: Above subpoena served on petitioner (R. 30).

June 18, 1935: Hearing held, and adjourned to June 27, 1935 (R. 14).

June 18, 1935: Petitioner, by his counsel, notified the Commission that he wished to withdraw his registration statement.

June 18, 1935: Permission to withdraw refused by Green, the officer of the Commission conducting the hearing (R. 30–31), and by a minute of the Commission (R. #639, p. 180).

June 18, 1935: Green issued a subpoena to petitioner commanding him to appear and testify on June 27 (R. 15–16).

June 19, 1935: Petitioner was served with this subpoena in New York (R. 31).

June 27, 1935: Hearing was held, at which petitioner's counsel appeared and presented:

(1) A dismissal of the registration statement (R. 96–97).

(2) A motion to dismiss the registration statement (R. 97–98).

(3) A motion to quash the subpoena (R. 98–99).

(4) An objection to jurisdiction (R. 100–101).

All of which were overruled by the officer conducting the proceeding and by the Commission (R. 31–32. Also R. #639, pp. 157–162).

June 27, 1935: Hearing continued indefinitely, pending the time when the Commission could require petitioner to appear by a court order (R. #639, p. 165).

July 3, 1935: Application for order filed by Commission to require petitioner to appear before Green on a date to be designated by the court (R. 2–15).

July 3, 1935: Goddard, U. S. D. J., issued order to show cause to petitioner why he should not be required to appear (R. 16–17).

July 6, 1935: Answer filed by petitioner (R. 17–29, 102).

August 12, 1935: Opinion rendered by Caffey, U. S. D. J., in favor of Securities and Exchange Commission (R. 103–110).

August 23, 1935: Order entered by Caffey requiring petitioner to appear before Securities and Exchange Commission on September 9, 1935 (R. 102).

August 23, 1935: Appeal allowed to C. C. A. 2d (R. 110–111).

November 4, 1935: C. C. A. affirmed (R. 119–125).
November 12, 1935: Order for mandate issued by C. C. A. (R. 126).
November 21, 1935: Petition for rehearing denied (R. 129).
December 17, 1935: Petition for certiorari filed (R. 129).
February 3, 1936: Certiorari granted (R. 129).

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SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1935.

J. Edward Jones, Petitioner,
vs.
Securities and Exchange Commission.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 6, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case arises under "The Securities Act of 1933", c. 38, 48 Stat. 74, U. S. C. Title 15, § 77a *et seq.*, as amended by act of June 6, 1934, c. 404, 48 Stat. 881. Prior to the amendment, the act was administered by the Federal Trade Commission; but by § 210, 48 Stat. 908, the administration was transferred to the respondent.

The act, § 2 (4), defines the term "issuer" as including every person who issues or proposes to issue any security, with certain exceptions. Sec. 6 (a) of the act provides—"Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer . . ." The filing of the registration statement must be accompanied by the payment to the commission of a fee measured by the maximum aggregate price at which the securities are to be offered. The information contained in the statement is to be made available to the public under such regulations as the commission may prescribe. The act prescribes in detail the character of information which is to be set out in the statement. Elaborate provisions are made in respect of liability on account of false registration statements, etc., and penalties are imposed for willful violations of any of the provisions of the act, or the rules and regulations promulgated by the commission under authority thereof, and for willfully untrue statements of material facts or omissions to state material facts. Section 5 (a) provides that unless a registration statement is in effect as to a security, it shall be unlawful for any person directly or indirectly to make use of the instrumentalities of interstate commerce or of the mails to sell or offer to buy such security,

etc., or to transport any such security for sale or for delivery after sale.

"Sec. 8 (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, . . .

"(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. . . .

"(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order."

Section 19 (b) provides that for the purpose of all investigations which the commission think necessary and proper for the enforcement of the act, any member of the commission or any designated officer may administer oaths and affirmations, subpena witnesses, take evidence, and require the production of books, papers, etc. Section 22 (b) provides that in case of contumacy or refusal to obey a subpena issued [by authority of the commission] to any person, the district courts of the United States and others named, upon application by the commission, may issue to such person an order requiring him to appear before the commission or one of its examiners, and there produce documentary evidence and give evidence touching the matter in question.

May 4, 1935, petitioner filed with the commission a registration statement in pursuance of section 6 (a) of the act, covering a pro-

posed issue of participation trust certificates. This registration statement under the terms of the act was to become effective 20 days later. On the 19th day, however, the commission, having already directed that stop-order proceedings be instituted, pursuant to §8 (d), sent petitioner a telegraphic notice reciting that the registration statement appeared to contain untrue statements of material facts and to omit material facts required and necessary and fixing a hearing at the office of the commission for Thursday, June 6, 1935, "at which time and place registrant may appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement." The hearing was postponed until June 18th.

On June 13, a subpoena *duces tecum* was issued commanding petitioner to appear before an officer of the commission on the 18th to testify with respect to his registration statement and to bring with him designated books, records and papers, listed as follows: "General ledger, subsidiary ledgers, journal, cash book, books of account and financial statements of J. Edward Jones; general ledger, journal, cash book and books of account of J. Edward Jones relating to J. Edward Jones Royalty Trust, Series 'M'; all contracts, agreements and correspondence of J. Edward Jones relating to the distribution of Participation Trust Certificates in J. Edward Jones Royalty Trust, Series 'M'; all correspondence and communications of J. Edward Jones with any State authority relating to the distribution of Participation Trust Certificates in J. Edward Jones Royalty Trust, Series 'M'."

June 18, in a written communication to the commission, petitioner formally withdrew his application for registration, assigning as a reason, among others, that the commission's action had been given widespread publicity and placed him in a situation to be severely damaged. The same day, his counsel appeared before the examiner for the commission and presented this written withdrawal, which was marked for identification, but excluded from consideration. On June 27, counsel for petitioner appeared again before the examiner, and filed a dismissal signed by petitioner dismissing "his registration statement heretofore filed" and withdrawing "all application for consideration thereof or action thereon." At the same time, petitioner's counsel filed a motion to dismiss and for an order from the commission permitting the with-

drawal of the registration statement and dismissing the registration proceeding and all matters pertaining thereto at petitioner's cost, and also a motion to quash the subpoena which had been issued and served on petitioner. The examiner acting for the commission denied the motions and refused to allow the withdrawal, no reason for his action being assigned. In so doing, the commission and its examiner assumed to act under and in conformity with a regulation of the commission which provides as follows:

"Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with the date of the giving of such consent and in the following manner: 'Withdrawn upon the Request of the Registrant, the Commission consenting thereto.' Such consent shall be given by the Commission with due regard to the public interest and the protection of investors."

On June 28th, petitioner filed with the court below a petition asking for a review of the commission's rulings which that court dismissed for lack of jurisdiction. A petition for a writ of certiorari to review that action was denied by this court. 296 U. S. — (No. 639, October Term 1935).

July 3, 1935, the commission filed an application in a federal district court for an order requiring petitioner to appear before the examiner to give evidence in the matter of petitioner's registration statement. Petitioner appeared and challenged, among other things, the validity of the orders of the commission denying petitioner's right to withdraw his registration statement, overruling his motions to withdraw and dismiss the proceedings and refusing to quash the subpoena which had been issued and served on petitioner. The district court denied petitioner's contentions and entered an order directing him to appear before the commission at a time and place fixed, to testify in the matter of the registration statement and to answer all pertinent questions regarding the information and documents filed by him with the commission in respect of such statement. 12 F. Supp. 210. On appeal, the court of appeals affirmed this order. 79 F. (2d) 617.

The principal points urged by petitioner as ground for reversing the judgment below, and the only ones that need be stated, are as follows: That the commission was bound as matter of law to sustain petitioner's withdrawal and motion to withdraw the registration statement; that the right to withdraw such statement under the circumstances disclosed was unqualified; that the commission, therefore, was without authority to require petitioner to appear and testify or to submit his private books, records, and papers for the inspection of the commission; that the Securities Act is unconstitutional, because it constitutes an attempt to exercise powers reserved to the states; and that it finds no warrant in either the commerce clause or in the power to regulate the use of the mails under the constitutional authority to establish post offices and post roads, or in any other provision of the federal Constitution.

First. By § 8 (d), when it appears to the commission that any untrue statement of a material fact has been made in the registration statement, or material facts have been omitted which are required or necessary to make the statements therein not misleading, the commission may institute an inquiry to determine whether a stop order shall issue suspending the effectiveness of the registration statement. Proceeding under that section, as we have seen, the commission, before the registration statement was to become effective by the terms of §8 (a), directed that a stop-order proceeding be instituted, and caused to be served on petitioner a telegraphic notice fixing a time for him to "appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement."

Such a proceeding is analogous to a suit in equity to obtain an injunction, and should be governed by like considerations. Applying those considerations, then, what was the status of the registration statement pending the inquiry under § 8 (d)? Notwithstanding the provision of § 8 (a), that the effective date of a registration statement shall be the twentieth day after it is filed, did this intervening action of the commission nevertheless have the effect of suspending the effective operation of the statement pending the hearing and determination of the stop-order proceeding? We are of opinion that it did have that effect. The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for ex-

ample, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued. We briefly review some of the decisions.

In *Daniel* v. *Ferguson,* L. R. [1891] 2 Ch. 27, suit had been brought to restrain defendant from building so as to darken plaintiff's lights. Notice of motion for a temporary injunction to be made upon a designated future day was served on the defendant. After receiving notice, the defendant put on a large number of men and proceeded with his building, running a wall up to a height of about 39 feet from the ground before the injunction was granted. The court, without regard to the ultimate rights of the parties, held that the wall thus run up by defendant should be torn down at once, as an attempt to anticipate the order of the court. A like situation was presented in *Von Joel* v. *Hornsey,* L. R. [1895] 2 Ch. 774. In that case, the evidence showed that defendant had repeatedly evaded attempts to serve him with process, and in the meantime had gone on with the building. Again, without regard to the ultimate rights of the parties, the court directed defendant to pull down that part of the building thus erected.

The Supreme Court of Pennsylvania in several cases has followed the same rule. *Clark* v. *Martin,* 49 Pa. 289, 298-299; *Easton Pass. Ry. Co.* v. *Easton,* 133 Pa. 505, 519; *Cooke* v. *Boynton,* 135 Pa. 102; *Meigs* v. *Milligan,* 177 Pa. 66, 72, 76; *Fredericks* v. *Huber,* 180 Pa. 572, 575. In *Cooke* v. *Boynton,* a bill in equity had been filed praying for a preliminary and perpetual injunction preventing defendants from interfering with a certain tramway of the plaintiff. Before a preliminary injunction was obtained, the defendants, on three separate occasions, had torn up the track which the plaintiffs had replaced. The third incident occurred while plaintiff was obtaining a preliminary injunction. The court said, "The writ was served just as they had finished the work of demolition, and this coincidence is strongly suggestive of a race against the law." The trial court had dissolved the injunction, in part on the ground that the act sought to be restrained had already been done, and that it was without power at that stage of the cause to restore the property to its former condition by mandatory injunction. The supreme court reversed. "What we did in the Easton

case", the court said, p. 110, "we will do here. We will restore the injunction without passing upon the merits of the case. They will be considered when it comes here upon final hearing."

In *New Haven Clock Co.* v. *Kochersperger,* 175 Ill. 383, the state supreme court held that the forced payment of a tax after the court has acquired jurisdiction of a bill to enjoin its collection may be restored by the court, even though no preliminary injunction was granted; and that such payment cannot be availed of as a defense upon the ground that the tax having been paid there is nothing to enjoin. The same court in *Turney* v. *Shriver,* 269 Ill. 164, 172, held the rule to be that "where a bill for injunction has been filed and the court has acquired jurisdiction of both the person and the subject matter of the suit and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status, . . ." See, also, *Konig* v. *M. & C. C. of Balto.,* 126 Md. 606, 627.

The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided. 1 High on Injunctions (4th ed.), § 5 (a).

We hold the principle of this rule to be applicable to the present case. When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement. Unless the registration statement is effective, the issuer of a security who makes use of the mails or of the instrumentalities of interstate commerce to sell the security or to carry the same for the purposes of sale or delivery after sale (§ 5 (a) of the act), is liable to severe penalties of fine and imprisonment. § 24. The word "effective", as here employed, connotes completeness of operative force and freedom to act. And a registration statement which, while still *in fieri,* is brought under official challenge in respect of its validity and subjected to an official proceeding aimed at its destruction, cannot be so characterized until the challenge

is determined in favor of the registrant. In the meantime, since he can act only at his peril, the registration statement can in no real sense be called effective.

Second. In this situation, does a registrant have the unqualified right to withdraw his registration statement or, in other words, to dismiss a pending proceeding by which, for his own advantage, he is seeking the use of the mails and the instrumentalities of interstate commerce? If he have such right, there is no basis for the exercise of discretion in respect of the matter on the part of the commission; for it is obvious that discretion does not exist where there is no power to act except in one way. Cf. *City of Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, 573; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93. The act contains no provision upon the subject; and it may not be construed as attempting to confer upon the commission an arbitrary power, under rule or otherwise, to deny, without reason, a motion to dismiss. We are unable to find any precedent for the assumption of such power on the part of an administrative body; and we go to the practice and rules of the courts in order to determine by analogy the scope and limit of the power; for, at least in the absence of a statute to the contrary, the power of a commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances. Both parties here seem to recognize the appositeness of this test.

The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter. *Pullman's Palace Car Co.* v. *Transportation Co.*, 171 U. S. 138, 145-146. In announcing the rule, this court approved and cited as authority the decision rendered by Chief Justice Taft, then circuit judge, in *Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569. The opinion in the latter case, reviewing the English and American authorities, states the rule as follows:

"It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. . . . The exception was where a dismissal of

the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

Chicago & A. R. R. Co. v. *Union Rolling Mill Co.*, 109 U. S. 702, 713-715; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476; *McGowan* v. *Columbia River Packers' Assn.*, 245 U. S. 352, 358; *Veazie* v. *Wadleigh*, 11 Pet. 55, 61-62; *Confiscation Cases*, 7 Wall. 454, 457-458. The foregoing decisions, together with others, are reviewed in an opinion delivered by Chief Justice Taft in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, and the conclusion stated as follows:

"The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.

"The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree. . . .

"The Government had not when the case was dismissed given any time or expense to the preparation and filing of a cross bill or of the evidence to sustain it. It had not taken any action in respect to the cause which entitled it to say that it would be prejudiced by a dismissal within the meaning of the authorities. It suddenly was awakened by the motion to dismiss to the fact that by eighteen months' delay, it was losing a possible opportunity to litigate a cross claim in the Court of Claims and without a jury. We think the same rule should obtain in the procedure of the Court of Claims as in federal courts of law and equity in respect to the dismissal of cases without prejudice."

The commission apparently concedes that in the absence of a regulation to the contrary, the foregoing general rule would be applicable. The commission, however, relying upon our recent decision in *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, — U. S. — (February 10, 1936), contends that its regulation, quoted *ante*, justifies the adverse action of the commission. In the *Brass Foundry* case, proof of a claim in bankruptcy had been filed. The trustee in bankruptcy moved to expunge the claim on the ground

that the creditor had received certain payments on account which constituted unlawful preferences. Several hearings were held before the referee, and the evidence indicated that the contention of the trustee was well founded. Before the hearing closed, the creditor filed a withdrawal of its claim and abandoned the hearing. The trustee insisted that it was entitled to an adjudication whether the payments made were unlawful preferences. The referee refused to permit a withdrawal of the claim; and his action was approved by the district court, and its judgment in turn affirmed by the circuit court of appeals having jurisdiction. We affirmed, holding that the general rule as stated in *Ex parte Skinner & Eddy Corp., supra,* had been modified by a rule of the district court which authorized the court to refuse, after issue joined, "to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings, and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action."

Assuming, without deciding, that the regulation of the commission was within its power and in force, it differs essentially from the foregoing rule of the district court. As applied to this proceeding in which there are no adversary parties, the regulation does not restrict the common-law rule. That rule, as we have seen, is that the right to dismiss is unqualified unless the dismissal would legally prejudice the defendants in some other way than by future litigation of the same kind. The regulation is "Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the commission consents thereto. . . . Such consent shall be given by the commission with due regard to the public interest and the protection of investors." This regulation is quite as general as the rule of the common law, and the possibility that the same registration may be attempted in the future is not within its terms any more than it is within the terms of the common-law rule. The question under the regulation is whether due regard to the public interest and the protection of investors requires that the withdrawal be denied. The test is the absence or presence of prejudice to the public or investors; and, plainly enough, under the decisions of this court, the doctrine that a dismissal must be granted if no prejudice be shown beyond the prospect of another suit, *unless there be a specific rule of court to*

the contrary, is applicable, and the withdrawal should have been allowed as of course.

We are unable to find anything in the record, the arguments of the commission, or the decision of the court below that suggests the possibility of any prejudice to the public or investors beyond the assumption, as put by the court below (79 F. [2d] at p. 620), that "an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective to withdraw before a stop order was issued and then to submit another statement with slight changes."

In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied. So far as the record shows, there were no investors, existing or potential, to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is, at the time alone concerned.

An additional reason why the action of the commission and of the court below cannot be sustained is that the commission itself had challenged the integrity of the registration statement and invited the registrant to show cause why its effectiveness should not be suspended. In the face of such an invitation, it is a strange conclusion that the registrant is powerless to elect to save himself the trouble and expense of a contest by withdrawing his application. Such a withdrawal accomplishes everything which a stop order would accomplish, as counsel for the commission expressly conceded at the bar. And, as the court below very properly recognized, a withdrawal of the registration statement "would end the effect of filing it and there is no authority under sec. 19 (b) to issue

the Commission subpoena and it could not be enforced by order of the district court under Sec. 22 (b)." 79 F. (2d) 619.

The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—, because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, should never be forgotten: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—"there is no place in our constitutional system for the exercise of arbitrary power." *Garfield* v. *Goldsby*, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal

rights, less destructive but no less violative of constitutional guaranties.

Third. The proceeding for a stop order having thus disappeared, manifestly it cannot serve as a basis for the order of the district court compelling petitioner to appear, give testimony, and produce his private books and papers for inspection by the commission. But the commission contends that the order may rest upon the general power to conduct investigations which it says is conferred by § 19 (b). The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. The first action taken by the commission was on May 20th, four days before the registration was to become effective under the statute. The commission then, after averring that upon reasonable grounds it believed the registration statement was false in material facts, directed that stop-order proceedings be instituted against the statement. It never has averred or directed anything else. This action was followed by a notice containing like recitals of a more detailed character, and calling upon the registrant to appear and show cause why a stop order should not be issued suspending the effectiveness of the statement. It was upon this direction and notice that all subsequent proceedings were had and upon which they must stand or fall. We do not interpret the order of the district court, the substance of which has already been stated, as resting upon a different view.

Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pur-

suit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as "a fishing expedition . . . for the chance that something discreditable might turn up" (*Ellis* v. *Interstate Commerce Comm.*, 237 U. S. 434, 445)— an undertaking which uniformly has met with judicial condemnation. *In re Pacific Ry. Comm.*, 32 Fed. 241, 250; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, 192, 193, 195, 196; *Boyd* v. *United States*, 116 U. S. 616; *Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407, 419; *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 305-307.

In re Pacific Ry. Comm. involved the power of a Congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin, denied the motion of the district attorney for the order and discharged the rule to show cause. Opinions were rendered *seriatim*, the principal one by Justice Field. The authority of the commission was definitely denied. That decision has frequently been cited and approved by this court. Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled "a fishing bill", and will, at once, be dismissed on that ground (Story, Eq. Pl. § 325), said: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."

The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the

government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light. Cf. *Byars* v. *United States*, 273 U. S. 28, 29, and cases cited. If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

Exercise of "such a power would be more pernicious to the innocent than useful to the public"; and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. *Entick* v. *Carrington*, 19 Howell's St. Trials, 1030, 1074—followed by this court in *Boyd* v. *United States*, 116 U. S. 616, 629-630. No one can read these two great opinions, and the opinions in the *Pacific Ry. Comm.* case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual — that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine*, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others.

Fourth. The foregoing disposes of the case and requires a reversal of the judgment of the lower court. In that view, it becomes unnecessary to consider the constitutional validity of the act.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1935.

J. Edward Jones, Petitioner, *vs.* Securities and Exchange Commission, Respondent. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 6, 1936.]

Mr. Justice Cardozo, dissenting.

I am unable to concur in the opinion of the court.

A subpoena *duces tecum* was issued by the Commission on June 13 before any attempt had been made to withdraw the registration statement. On June 18, the day of the attempted withdrawal there was issued a second subpoena commanding the registrant to appear and testify, and this was served upon him by the Marshal. Then and for months earlier a standing Regulation gave warning to him and to the world that without the consent of the Commission there could be no withdrawal of a statement once placed upon the files. I am persuaded that the Rule is valid; that the Commission had abundant reasons for maintaining jurisdiction; and that notice of withdrawal did not nullify the writ.

The subpoena flouted by the witness was issued under § 19 (b) of the statute as well as under § 8 (e). So the sworn petition for the Commission explicitly informs us. It was issued in aid of any legitimate inquiry that the Commission had authority to initiate and prosecute by reason of a false and defective statement then part of the official records. Nothing in the case gives color to the argument that the witness was to be subjected to a roving examination without the restraints of pleadings or bounds analogous thereto. On the contrary, the order of the District Court upholding the subpoena directs him to make answer to questions pertinent to the documents already filed with the Commission, to these and nothing more. If the petitioner is to prevail in his attack upon the writ, it will have to be on broader grounds than those of form and method. He must be able to make good his argument that by the mere announcement of withdrawal, he achieved results analogous to those of a writ of prohibition.

Recklessness and deceit do not automatically excuse themselves by notice of repentance. Under § 24 of the Act, there is the possi-

bility, at times the likelihood, of penal liability. A statement wilfully false or wilfully defective is a penal offense to be visited, upon conviction, with fine or imprisonment. Under § 12, there is the possibility, if not the likelihood, of liability for damages. The statement now in question had been effective for over twenty days, and the witness did not couple his notice of withdrawal with an affidavit or even a declaration that securities had not been sold. Nor is the statute lacking in machinery with which to set these liabilities in motion upon appropriate occasion. Under § 19 (b), plenary authority is conferred on the Commission to conduct all investigations believed to be necessary and proper for the enforcement of the Act and of any of its provisions. There will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future. But the opinion of the court teaches us that however flagrant the offense and however laudable the purpose to uncover and repress it, investigations under § 19 (b) will be thwarted on the instant when once the statement of the registrant has been effectively withdrawn. If that is so, or even indeed if the effect of the retraction is to embarrass the inquiry—to cloud the power to continue—the fairness of the Rule is proved out of the mouths of its accusers. If such consequences are inherent in a privilege of withdrawal indiscriminately bestowed, there is need of some restraint upon the power of the wrongdoer to mitigate the penalties attaching to his wrong. Shall the truth be shown forth or buried in the archives? The Commission is to determine in the light of all the circumstances, including its information as to the conduct of the applicant, whether the public interest will be prompted by forgetting and forgiving. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, — U. S. —, February 10, 1936.

The objection is inadequate that an investigation directed to the discovery of a crime is one not for the Commission, but for the prosecuting officer. There are times when the functions of the two will coincide or overlap. Congress has made it plain that any inquiry helpful in the enforcement of the statute may be pursued by the Commission, though conduct punishable as a crime may thereby be uncovered. Indeed, the Act is explicit (§ 22 (c)) that a witness is not excused from testifying on the ground that the testimony required of him may tend to incriminate him or expose him to a penalty or forfeiture. He may, however, claim his privilege, and if then compelled to testify, may not be prosecuted there-

after for any matter thus revealed. All this is far from proving that there can be no practical advantage in keeping the proceeding open. Aside from the possibility of civil liability, the offender may not choose to claim the privilege, and even if he does and is then excused from testifying, other witnesses may be available, for example, employes, who are not implicated in the offense and who can bring the facts to view. Moreover, amnesty for one offender may mean conviction for another, an associate in the crime. Inquiry by the Commission is thus more penetrating and efficient than one by a grand jury where there is no statutory grant of amnesty to compel confederates to speak. More important still, the enforcement of the Act is aided when guilt is exposed to the censure of the world, though the witness in the act of speaking may make punishment impossible. It is no answer to all this that upon the record now presented a crime has not been proved or even definitely charged. An investigator is not expected to prove or charge at the beginning the offenses which he has reason to suspect will be uncovered at the end. The petition in behalf of the Commission enumerates one by one the false statements and the omissions imputed to the registrant. Some at least are of such a nature that if chargeable to him at all, they can hardly have been made otherwise than with criminal intent. To give the investigating officer an opportunity to reach down into the hidden wells of knowledge and the more hidden wells of motive is the very purpose of the Regulation by which the proceeding is kept open after the registrant has tried to end it.

The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. When wrongs such as these have been committed or attempted, they must be dragged to light and pilloried. To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection. If with-

drawal without leave may check investigation before securities have been issued, it may do as much thereafter, unless indeed consistency be thrown to the winds, for by the teaching of the decision withdrawal without leave is equivalent to a stop order, with the result that forthwith there is nothing to investigate. The statute and its sanctions become the sport of clever knaves.

Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. It cannot be an immunity from the unreasonable search or seizure of papers or effects: the books and documents of the witness are unaffected by the challenged order. It cannot be an immunity from impertinent intrusion into matters of strictly personal concern: the intimacies of private business lose their self-regarding quality after they have been spread upon official records to induce official action. In such circumstances the relevance of *Entick* v. *Carrington*, 19 Howell's St. Trials, 1030, 1074, or *Boyd* v. *United States*, 116 U. S. 616, 629, or the *Matter of the Pacific Railway Commission*, 32 Fed. 241, 250, is not readily perceived. Cf. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 469, 478. If the immunity rests upon some express provision of the Constitution, the opinion of the court does not point us to the article or section. If its source is to be found in some impalpable essence, the spirit of the Constitution or the philosophy of government favored by the Fathers, one may take leave to deny that there is anything in that philosophy or spirit whereby the signer of a statement filed with a regulatory body to induce official action is protected against inquiry into his own purpose to deceive. The argument for immunity lays hold of strange analogies. A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery.

The witness was under a duty to respond to the subpoena.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.